# REPORTS

OF

# C A S E S

ARGUED AND DETERMINED

IN

# *THE HIGH COURT OF CHANCERY,*

DURING THE

## TIME OF LORD CHANCELLOR ERSKINE,

AND

## LORD CHANCELLOR ELDON.

VOLUME XIII

COMMENCING AFTER TRINITY TERM, 46 GEO III 1806

AND

ENDING IN TRINITY TERM, 47 GEO III 1807

*BY FRANCIS VESEY, ESQ*

OF LINCOLN'S INN, BARRISTER AT LAW.

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1809

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| Lord ERSKINE, Lord ELDON, | Lord Chancellor. |
| Sir WILLIAM GRANT, | Master of the Rolls |
| Sir ARTHUR PIGGOTT, Sir VICARY GIBBS, | Attorney-General. |
| Sir SAMUEL ROMILLY, Sir THOMAS PLUMER, | Solicitor-General. |

# TABLE

OF

# CASES REPORTED.

N. B. "*Versus*" always follows the name of the Plaintiff.

# TABLE

OF

# CITED CASES.

*Manuscript, and, of those in print, impeached, corrected, or otherwise particularly noticed.*

# TABLE OF CITED CASES.

# CASES IN CHANCERY.

## THE SITTINGS AFTER TRINITY TERM,

## 46 *GEO.* III. 1806.

### MURRAY *against* LORD ELIBANK.

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*July* 21.

Right of children to a provision out of the property of their mother, under a decree directing a settlement on her and her children, notwithstanding her death before the report; no act being done by her to waive the equity.

IN this cause, the demurrer of the defendant, *Montolieu*, having been overruled,(a) answers were put in; and the cause came on to be heard.

Mr. *Alexander* and Mr. *Cooke*, for the plaintiff, relied upon the opinion expressed by the Lord *Chancellor*(b) upon the demurrer.

Mr. *Richards* and Mr. *W. Agar*, for the defendant *Montolieu*.

This is a very important and a new question, which the Lord *Chancellor* did not profess to decide upon the demurrer. The opinions that have been expressed, shew the notion that has prevailed as to the practice; but there is no decision upon it. The order by Lord *Alvanley* would not have been made, if the *Court had been aware that the creditors were not parties; the husband and wife having assigned the fund to secure a debt, and it was delivered out of Court upon the statement that it was very small: the creditors not being parties, and no contest. The cases of *Martin* v. *Mitchell*, and *Rowe* v. *Jackson*,(a) were also upon  * 2

(a) Reported, [illegible], vol. 10 [illegible].

(b) Lord *Eldon*.

(a) As to these cases, see the former report, *ante*, vol. 10. p. [illegible].

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petition; and no contest. It is true, this equity is the creature of this Court: it has been held, both here and by Lord *Eldon*, that it has no analogy to a fine; and it does not arise, if the husband gets the property, if it is not intercepted in the way: but, if the order of the Court is necessary, either upon the bill of the wife, which must now be admitted,(*b*) or of the husband, the Court will make him do what is just: otherwise there is no jurisdiction against him, and he cannot be held guilty of a contempt. He may run his life against her's. The Court goes no farther than refusing to assist him, unless he will make a provision. The Court does not act upon the interest of the wife, for if so they would give it to her. The Court has no dominion upon the subject, but exercises a sort of arbitrary authority; there being no interest in her in point of law. The Court cannot compel him to give her an interest, but merely refuses to interfere in his favour, except upon certain terms. There is no doubt that after a reference directed, as to a provision for the wife and children, she may come the next day and by her own act of consent defeat that provision for her children, though without her consent the Court would not give the fund to her husband; but there is no jurisdiction to prevent her giving it to him. Mr. Justice *Buller* attempted it, and refused to take the consent;
3 but *Lord *Thurlow* held, that he could not refuse it; and with great reluctance gave the money to the husband. The power which the wife has in that way to defeat the reference in favour of the children, shews clearly that the reference is directed upon her account, not their's.

(*b*) See *Oswell* v. *Probert*, *ante*, vol. 2. p. 680 *Freeman* v. *Parsley*, *ante*, vol. 3 p 421 *Mitford* v. *Mitford*, *ante*, vol. 9 p. 87.

In the case of *Alexander* v. *M'Culloch*(*a*) it was never thought possible to give the property to the wife: but each came, from time to time, to get a little; and Lord *Thurlow* fed the husband occasionally, in order to induce him to make a proposal. But she might have come to give it away to him: and in fact they did at last agree; as they did also in *Macaulay* v. *Phillips*.(*b*) The protection subsists only as long as the wife chooses. When she is gone, the equity,

(*a*) Cited, *ante*, vol. 2. p. 192.

(*b*) *Ante*, vol. 4. p. 15.

which is attached to her, and to her only, must be gone also. What interest can the children have against their father? Are they purchasers as against him? He is a purchaser of his wife's *choses in action* by the act of marriage, completed by the administration. What right have the children as against their father to insist upon a part of the fortune?

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In *Scriven* v. *Tapley*(c) the Lord *Chancellor* held this equity personal to the wife; reversing a decree at the Rolls in favour of the children. *Bond* v. *Simmons*(d) also is an authority that the wife surviving is entitled to the whole; and the consequence is, that by her death the equity is gone, and the children cannot file a bill to bring the money into Court. These authorities outweigh the loose *dicta* upon the petition, *and without contest, in favour of this bill; and it stands upon no foundation of principle. 4

(c) *Amb.* 509.

(d) 3 *Atk.* 20.

Mr. *Alexander*, in reply.

The opinion of Lord *Eldon* is expressed in favour of this bill. It is supposed, the plaintiffs must contend, that this equity would bind the wife herself, if she chose to relinquish it. But, admitting that, notwithstanding an order for a settlement, if the husband dies, the wife surviving is not bound to make a settlement, can it be said, therefore, the husband is not bound? There is no doubt the equity is that of the wife; and she may, in any stage, come into Court and relinquish the equity both for herself and her children.

The Master of the Rolls.

Down to what time?

Reply.

To the time at which the settlement is actually made. It is an equity in opposition to the husband's legal right; upon

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which it is imposed as a burthen in favour of herself, and those in whose favour she may think fit to apply; and which she may at any period abandon. There is nothing inconsistent in her right to relinquish that claim, which she has on behalf of herself and her children. But after her death, the Court will suppose, she died with the intention to insist upon it for her children; in whose behalf it shall subsist after her death, unless expressly waived during her life. After the order made upon her application, and not waived, which by the event of her death is now become impossible, the right of the children is vested: the effect of the order being a specific lien upon the particular fund, in respect of which the husband makes the application,
*5 *notwithstanding the general terms of the order.

The MASTER of the ROLLS.

This case arises out of the case of *Lady Elibank* v. *Montolieu*;(a) by the result of which the right of Lady *Elibank* to maintain a suit for a settlement against her husband and the administrator was established; and it was determined, that the claim, which the administrator had as a creditor of her husband, did not stand in the way of her right. The question now, Lady *Elibank* having died before any thing was done under the decree, by which the master was directed to approve a settlement upon her and the children, is, whether the children have a right to the benefit of that decree.

(a) *Ante*, vol. 5. 737.

It is contended on the part of the defendant *Montolieu*, that the right to demand a settlement is a personal equity, attaching to a married woman, and in no sense the right of the children; for, if it were, the mother could not relinquish it; as it is admitted she may; that, though the children may derive a consequential benefit from having the settlement, made upon their mother, extended to them, yet when her right is out of the question, as it is in this in-

stances by her death, there must likewise be an end of theirs. Upon the other side it was contended, that when a settlement was by the decree directed to be made upon the mother and the children, the right of the children is so far fixed, that the Court will recognize and carry it into effect, notwithstanding her death: provided no act was done by her, to waive the benefit of it. It seems to be assumed in the argument, both here and *before Lord *Eldon*, that it was competent to the mother to waive the settlement at any time, before it was actually completed: that is, even after a proposal given in by the husband. Lord *Hardwicke* however determined the contrary;(a) stating that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does not directly apply to this case; as, I believe, no proposal was laid before the master in this case.

As to the right of a married woman, after a proposal by her husband for a settlement of her property, to waive it, so as to bind the interest of the children, *Quære.*

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(a) *Anon.* 2 *Ves.* 671.

With regard to this equitable right, which a married woman has in this Court to a provision out of her own fortune, before her husband reduces it into possession, it stands upon the peculiar doctrine of this Court. It is vain to attempt by general reasoning to ascertain the extent of that doctrine. We must look to the practice of the Court itself. It is sufficient to say, the habit of the Court has always been of itself, and without any application previously made by the married woman, to direct an inquiry, when money has been carried over to her account, whether any settlement has been made; for the money is carried over subject to that inquiry; and the constant habit has been to direct a settlement, not upon the wife only, but upon the children also. I am not aware, that she has in any case been permitted to say, she claims a settlement for herself, but not for her children. She has the option not to have any settlement made: but if a settlement is to be made, it

The equitable right of a married woman stands upon the peculiar doctrine of the Court.

When money is carried over to her account, the habit of the Court is without any previous application by her to direct an inquiry, whether any settlement has been made; and the constant habit has been to direct a settlement, not upon her only, but upon the children also: her option to waive a settlement not enabling her to have it confined to herself, excluding her children.

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is always directed for the benefit of the wife and the children. When she comes to give up her right to her husband, she is examined, *whether she wishes for any settlement. If she does not desire any settlement, then the money is paid to her husband. If she desires a settlement, the settlement is upon her and the children.

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Whether children have a substantive independent right to claim a settlement out of the property of their mother after her death, if not directed during her life, Quære.

(a) 3 Atk. 695. See p. 717.

(b) 2 Atk. 180.

The question has been made, whether the children have any substantive and independent right to claim a settlement after the death of their mother, if a settlement was not directed during her life. In the case of *Hearle* v. *Greenbank*,(a) Lord *Hardwicke* appears to state that as a doubtful point; and that he conceived there was no case determining that the children have such right. His Lordship seems not to have recollected the case, that was before him, *Grosvenor* v. *Lane*,(b) in which he took notice of such a decree; though the question before him was not upon the point. That was the case of the second husband, endeavouring to reduce his wife's fortune into possession; and the Court directed a settlement upon the child: the immediate point in the cause, before Lord *Hardwicke*, turning upon the right of the child absolutely to the whole legacy, in consequence of an appropriation of it by the second husband.

(c) Amb. 509.

In a subsequent case, *Scriven* v. *Tapley*,(c) Sir *Thomas Clarke*, as a matter of course, taking it as the ordinary equity, directed a proposal by the representative for a settlement upon the child, the wife being dead. That part of the decree, it is true, was reversed by Lord *Northington*; but the opinion, that children have that equity in their own right, and independent of any claim through the mother, prevailed so much, that notwithstanding that reversal, in a year and a half afterwards Sir *Thomas Sewell*,

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(a) 1 Dick. 391.

in *Cockel* v. *Phips*,(a) made precisely the same decree. Every one knows, how intimately Sir *Thomas Sewell* was acquainted with the practice of the Court.

There is therefore a great deal of authority in opposition to that decision by Lord *Northington* in *Scriven* v. *Tapley*,(b) all weighing strongly in favour of the right of the children, claiming under a decree in favour of their mother; for, if their right to come with an original demand for a settlement upon them, their mother having died without demanding any settlement, is established, *a fortiori*, if she has claimed, and the Court has directed a settlement, the children must be entitled. As to that there are very few cases, but all are one way. The doctrine as far as there is any memorial of it is uniform; and it is upon the uniform, habitual doctrine of the Court, that you are least likely to find cases; and in the cases that have occurred, the Court has interposed, not upon any controversy between the parties, but upon its own doctrine. In *Martin* v. *Mitchell*,(c) the husband claimed the fund; and the Court would not permit him to take it; but directed the former order for a settlement upon the wife to be prosecuted. In *Rowe* v. *Jackson*,(d) a similar application appears to have produced a similar refusal; and both these cases were before Lord *Thurlow*. No ground is laid, upon which I should be induced to depart from the established doctrine. We can look no where but to the practice of the Court for the extent of that doctrine; here we find it. There is no instance, in which the husband has succeeded in getting money *out of Court without making a provision for the children.

These plaintiffs therefore are clearly entitled upon their supplemental bill. It is not necessary to determine, whether they could have got at it by any other mode.

(b) *Amb.* 509.

(c) Stated in the former report, *ante*, vol. 10. p. 84.

(d) Stated in the former report, ibid.

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## ANTROBUS *against* THE EAST-INDIA COMPANY.

ROLLS, *July* 1, 2. 21.

Decree under the statute 37 *Hen.* VIII for payment of tithes in *London*, as to warehouses, erected by the *East-India Company* upon the site of old buildings, and occupied by them, at 2*s*. 9*d* in the pound upon the value to be let; without an issue, no specific, customary payment in lieu of tithes being alleged.

(*a*) Stat 37 *Hen.* VIII.

THIS bill was filed under the decree and act of parliament(*a*) for the payment of tithes in *London*, seeking payment at the rate of 2*s*. 9*d*. in the pound upon the annual value to be let of premises, consisting of extensive warehouses, lately erected by the *East-India Company*, and used by them in the course of their trade. These warehouses were erected upon the site of small tenements; some of which appeared by the answer to have been formerly occupied at low rents: as to the others, the ancient rents were not known. The answer did not state any specific, customary payment in lieu of tithes; but alleged generally, that some less sums than after the rate of 2*s*. 9*d*. in the pound were paid; specifying by a schedule some payments; not however carrying them back to the date of the statute.

The defendants insisted, that the payment according to the statute, could be only upon such of the old rents, as were ascertained; and that nothing was to be paid in respect of those premises, the ancient rents of which were
* 10 not known; and they contended, that an *issue ought to be directed; which was opposed by the plaintiff; insisting that no specific, customary payment being set up, no foundation was laid for an issue.

Mr. *Richards*, Mr. *Leach*, and Mr. *Wetherell*, for the plaintiff.

These premises not being exempted from tithes by any accustomed payment, the rector of this parish has the same right, as other rectors in the city of *London* have under the decree and statute. To avoid that right, the defendants must shew a certain customary payment; otherwise, the

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general right by common law or statute not applying, the rector would not be entitled to any thing. The fact also, that there is such customary payment, must be put in issue; and therefore, those who insist upon the particular right against the general right by law, must state with accuracy that particular right; as they could not resist the general right by alleging, that there is some *modus;* not stating what that *modus* is. A defendant, by his answer setting up a particular *modus*, cannot prove another *modus*, different from that put in issue by the answer: as the plaintiff would be deprived of the opportunity of disproving that *modus*, which is not put in issue. Here is no allegation of any certain, accustomed payment, protecting the occupier from this payment at the date of the decree and statute. They allege merely, that at certain particular times there were particular payments; with a general allegation, that some less sums than after the rate of 2*s*. 9*d*. in the pound were paid; not referring to the particular sums, before stated, as those less sums. The question therefore, whether an accustomed payment exists, is not raised upon this record. Though now it is not *necessary to state a *modus* 11
with the same strictness as formerly, it must be stated with convenient certainty. This allegation is too loose, as to customary payments; not stating what they were, nor upon what rents to be calculated. Under such a loose assertion of customary payments, they cannot prove customary payments. Lord *Eldon's* opinion in the case of *The Wardens and Minor Canons of St. Paul's* v. *Morris*(*a*) was, that the issues ought not to have been granted.

(*a*) *Ante*, vol. 9. p. 155

The next consideration is, there being no rent subsisting, whether the payment is to be calculated upon the old rent, or upon the present actual value of the premises to be let. If the object of the Legislature was to impose this payment only upon persons paying rent, and not upon owners occupying themselves, the statute, as making a provision for the minister, is perfectly nugatory. What

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necessity was there for the clause, exempting expressly houses of noblemen and halls of companies, unless under the general enactment, every owner, occupying his own house, was liable? That clause is certainly involved in considerable obscurity. Probably such houses were not before subject to tithes; and therefore were not intended to be subject to the payment under the statute. One *casus omissus* is obvious; that the Legislature did not look to the depreciation of money, when they made the actual rent at which the premises, occupied by the owner, were last *bona fide* let, the standard. But both within the letter and the meaning the houses must be the same. Can it be said, that those houses being taken down, and much more valuable premises erected on the site, those premises are the same and the former rent is to be the criterion? Suppose
12 a garden occupied for profit, and *therefore charged under the act, to be built upon; the rent of 50*l.* converted to 10,000*l.*: the duty of the clergyman also being considerably increased; could the proposition, that the occupiers of those houses were to pay upon the rent of the garden, be maintained? To meet such a case, "rent" must be supposed to mean "value:" the only standard with reference to premises, that have not been used for profit; to which also, the words "without fraud or covin," particularly point.

In *Green* v. *Piper*(a) the construction put upon the act is, that all houses are chargeable, except those, as to which there is a particular clause of exemption; which was considered necessary for the purpose of exemption. In *Sheffield* v. *Pierce*,(b) 2*s*. 9*d*. in the pound upon the improved rent was decreed to be due. *Ivatt* v. *Warren*,(c) *Ward* v. *Hilder*,(d) *Grant* v. *Cannon*,(e) imperfectly reported: but the decree was for payment upon the value of the premises, confessed in the answer. *Sayer* v. *Mumford*.(f)

In *Williamson* v. *Gosling*,(g) and *Bramston* v. *Heron*,(h) the decree was according to the yearly value of the new houses, built on the site of the old houses, with costs.

(a) Cro Eliz 276.
(b) 2 Gwil 503. 1 Wood, Exch 38.
(c) 3 Gwil. 1054.
(d) 2 Gwil 538. 1 Wood, Exch 305.
(e) 2 Gwil. 541.
(f) 2 Gwil. 546.
(g) 3 Gwil. 902.
(h) 4 Gwil. 1314.

In a very late case, *Kynaston* v. *The East-India Company*,(i) to a bill by an impropriator the defence was, that the defendants having built the warehouses, and being themselves the owners, there was no rent; and *the buildings formerly on that situation were inhabited by persons of a low description, paying very small rents. An inquiry was directed as to the annual value; and a decree was made for payment upon that; from which decree, however, an appeal by the *East-India Company* is now depending.

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(i) In the Court of Exchequer, *Easter Term*, 1805

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Mr. *Adam*, Mr. *Alexander*, and Mr. *Wyatt*, for the defendants.

The customary payment is stated sufficiently to enable the defendants to go into evidence. It is not necessary to state it as a *modus*. It is stated, as it was in *Bennet* v. *Treppass*,(a) and *Kynaston* v. *The East-India Company*. If, however, this is to be so strictly considered, a plaintiff, seeking to establish a *modus*, must prove it strictly; and prove it as he lays it. But a defendant in a suit for tithes is not under the necessity of proving a *modus* exactly as he states it. If upon the record a *modus* appears that would repel the demand, the defendant may go into evidence upon that. In *Atkyns* v. *Lord Willoughby De Brooke*,(b) the distinction is taken by the Lord Chief Baron. In several cases in *Ambler*, a *modus*, though very loosely stated by way of defence, was allowed: *Mallock* v. *Browse*,(c) *Wood* v. *Harrison*,(d) *Chapman* v. *Smith*, there cited. The distinction of *The Warden and Minor Canons of St. Paul's* v. *Morris*,(e) is, that there was an establishing bill, and therefore it was necessary to prove the payment, as laid. The result of the authorities is, that if a defence appears by the answer, the Court will not make a decree against it, but will put it in a course of investigation. This defence is put upon the same ground as that in *Bennett* v. *Treppass*, and *Kynaston* v. *The East *India Company*;(a) in which the answer was very general; and no objection was taken. The question was not upon customary payments.

(a) 2 *Gwil* 633 *Gilb* 191 2 *Bro* *P C* 437

(b) 4 *Gwil.* 1412

(c) *Amb* 42

(d) *Ib* 56

(e) *Ante*, vol. 9 p 155

(a) 2 *Gwil* 633. *Gilb* 191 2 *Bro* *P C*. 437.

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The point made by the defendants was, that, there being no previous rent to go by, the plaintiffs were entitled to nothing.

2dly. As to the construction of the act, the distinction between rent and value is perfectly understood, both in common parlance and legal acceptation: some strong reason is necessary to give it a different sense from that, which it has naturally. In the instance put of a garden built upon, could a construction be adopted, the effect of which would go infinitely beyond the object of the Legislature? That object was to fix the provision of the minister at a proper compensation, upon a criterion not fluctuating. They could not have contemplated that a great company would arise and erect great warehouses upon premises previously occupied by small tenements; that, in such an event, the minister's duty also being diminished, he should receive upon the increased value. Recourse should be had to the Legislature: but this Court cannot adopt a construction that will give to this provision an excess that could not be intended, and would not be proper, for any minister. The object of the decree and statute was to establish peace upon this subject in *London;* not to raise the revenue of the clergy. *Dunn* v. *Burrell.*(b)

(b) 1 *Gwil.* 299.

In the first and second clauses of the statute, rent cannot possibly be referred to value; being from its adjuncts clearly fixed to its proper meaning. Can the expression of the 4th clause, "after the quantity of such yearly rent as
* 15 "the same was last letten for *without fraud or covin," be construed, according to the value? The question is, whether the rent, taken as the criterion, is fraudulent, or not. Other clauses are equally against this forced construction; that they were to go into the investigation of a subject of great uncertainty, upon which, more than upon any other, professional men differ: no other word than "rent," having a determined, appropriated meaning, being used. In the 8th clause, as to mansion-houses, the same word "rent"

is used; not "value." The plaintiff therefore is compelled to rely upon the 16th clause; providing, that the decree shall not extend to houses of noblemen, halls of companies, &c. That is a regulation as to those houses, merely in that condition; not when they may fall into any other condition; a regulation for exemption in that particular situation, not providing for a future change; not laying down any rule applicable to an altered state, when, the house falling into other occupation than that of a nobleman, rent shall be ascertained. A construction against the natural import of a word, unless it is used in a manner so vague and uncertain as to force another construction, is inconsistent with every rule.

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The case of *Skidmore* v. *Eire*,(a) in the Court of Common Pleas, decided in the 5th year of King *James* I. 60 years after the decree, a case therefore of very considerable authority, was put upon the ground of fraud, in reserving less rent "than hath been accustomed, or is paid." The second resolution is an express authority for these defendants; that such houses as were never let is *casus omissus*; shewing, that it was generally understood, that this statute had not provided for every case. The 16th clause certainly has difficulty; but *the other parts of the act, which are clear, cannot be construed with reference to that.

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(a) 2 Inst. 659.

In *Ivatt* v. *Warren*,(a) the next case in point of time, the 2*s*. 9*d*. was upon a rent of precisely 9*l*. without a fine. The word "value," therefore, must have been used in a loose sense. In *Ward* v. *Hilder*(b) both the words "rent" and "value" are used, as it is said, as synonymous terms: but it cannot be concluded from thence, that "value" is to be substituted for rent, and that those terms would have been used so loosely if the Legislature had supposed that such a point would be raised. In the subsequent cases the Court, finding those words loosely used in former decrees, followed them.

(a) 2 Gwil. 1054.

(b) 2 Gwil 538.

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Mr. *Richards*, in reply.

There is nothing peculiar in pleading a *modus*. The pleading of every custom is precisely the same; and a *modus* is only a customary payment. In all cases of custom or prescription, a grant or agreement is supposed; but whatever is in derogation of the general right must be stated precisely The opinion of Lord Chief Justice *Eyre* was, that a *modus* ought to be pleaded with much the same nicety as that or any other custom is pleaded at law. Both before and since his time, the same strictness has not been considered necessary. But the custom must be averred in the answer, or the Court cannot proceed; and the objection is, that here is no custom pleaded.

Though the right of the clergy of *London* before this act
17 of parliament is very obscure, there was certainly a *general right to tithes previously; in the room of which this provision under the act was substituted. The occupier must, in his defence against the general right, state the custom. The rector is not to shew that the occupier has not paid less than 2s. 9*d.*, and the course of *Bennett* v. *Treppass*,(a) *The Warden and Minor Canons of St. Paul's*, and the other cases, has been accordingly, that the defendant set up a customary payment upon which he relied. In this answer there is no averment that these payments, which the defendants state were paid, or payable, at the time the act of parliament was made: stating, only, that in 1685 these sums were paid, and that the sums specified by the statute were not paid: not carrying it back to the date of the statute, nor averring that it was a customary payment. In *Bennett* v. *Treppass* particular sums were stated as customary payments. The dispute was as to the issue, which was very singular. Except that case, and *The Warden and Minor Canons of Paul's* v. *Morris*,(b) in which Lord *Eldon's* opinion was, that the issue ought not to have been directed, there is no instance in which the particular thing has not been stated for the consideration of the Jury. The case of *Bennett* v. *Treppass* is anomalous; and

(a) 2 Gwil. 643. Gilb. 191. 2 Bro. P. C. 437.

(b) Ante, vol. 9. p. 155.

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throughout the other cause Lord *Eldon* constantly disputed the propriety of the issue. The defendants are pressed by the clause as to houses of noblemen, which cannot be accounted for upon any supposition but that the owner of a house, occupying himself, was to pay. Many clauses of the act admit no other construction than that of the plaintiff. Rent is in many places used as the medium through which the value is to be ascertained; and, if no rent is actually reserved, the payment must be upon the value. *The cases of *Williamson* v. *Gosling*,(a) followed by *Bramston* v. *Heron*,(b) and *Kynaston* v. *The East India Company*,(c) sufficiently shew the construction that has been put upon this act.

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(a) 3 *Gwil.* 902.
(b) 4 *Gwil.* 1314.
(c) In the Court of Exchequer, *Easter Term*, 1805.

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The question in this cause is, in what manner the defendants are to pay tithes for such of their houses and warehouses as lie in the parish, of which the plaintiff is rector. I do not find in the answer, that there are any of the premises belonging to the defendants within this parish, for which no tithe is payable. In their schedule they represent some tithe to be actually paid for every part of their property within the parish. Where any tithe is payable, it must be at the rate of 2*s.* 9*d.* in the pound of the rent, or value, as the statute may be construed; except where at the time the statute was made a less sum had been accustomed to be paid: I say, at the time of the statute; as that is the proposition to be made; though it may be made out by evidence at a much more recent period.

When the defendants set up such customary payment, as a bar to the demand of the full statutory tithe, the usual course has been to direct an issue, whether that payment has had such an existence as brings it within the description of a customary payment according to the true intendment of the act. The defendants say, such issue ought to be directed. That is opposed by the plaintiff; maintain-

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ing that there is not *in the answer, an allegation of any specific, customary payment; and consequently no foundation is laid for such issue. I am not aware of any case, in which an issue has been granted, where the defendant did not specifically state what was the customary payment, upon which he meant to insist. That is not done by this answer, either directly or by reference. All the defendants say, is, that to the best of their knowledge and belief, less sums than after the rate of 1*s.* 4 1-2*d.* in 10*s.* or 2*s.* 9*d.* in the pound have been accustomed to be paid for and in lieu of tithes of the said premises. In this part of the answer there is no reference to the schedule. What is here asserted might be perfectly true; though the payments had varied every year, if they had not come up to 2*s.* 9*d.*

(a) 2 Gwil 633 Gilb 191 2 Bro P C 437

(b) Ante, vol. 9 p. 155.

In the case of *Bennett* v. *Treppass*,(a) that has been referred to, precise sums were stated as the customary payments, upon which the defendant meant to insist; and those sums were afterwards found by a Jury to be customary payments within the meaning of the statute. In the case of *The Warden and Minor Canons of St. Paul's* v. *Morris*,(b) the defendants insisted upon payments, rendered certain by reference to the paper, which they called the first or ancient rate. They insisted, that the payments under that were ancient customary payments. Lord *Eldon's* objections to the issue, directed in that cause, seem to have turned upon this; that the defendants had set up one rate by their first answer, and a different rate by the answer to the amended bill and by their own cross bill; and, as the issue was directed in both causes, his Lordship thought, upon the whole record no specific customary

20 *payment was set up, as two different payments were set up. The objection is as strong, that here is no specific payment alleged. In that case the different payments destroyed the specification: in this, any specification is altogether wanting. In the case of *Bramston* v. *Heron*,(a) in which the allegation was much more specific than this, yet an issue was denied. They stated the clause in the statute;

(a) 4 Gwil 1514

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and then said, there were ancient payments, made in the parish, less than 2*s*. 9*d*. in the pound, and referred to an ancient record of 1629, in support thereof. The proposition in this answer, that less payments than at the rate of 2*s*. 9*d*. in the pound have been accustomed to be paid, says nothing more, than that the tithe has not been paid at the rate of 2*s*. 9*d*. in the pound. That is perfectly immaterial, unless you can shut out the claim to the full statutory tithe, unless you can shew some specific, customary payment, that may be presumed to have had existence at the time the statute was made. That is not done; and therefore the defendants have not entitled themselves to an issue.

Then, no exemption being claimed, and no customary payment sufficiently alleged, the rector is of course entitled to a decree at the rate of 2*s*. 9*d*. But the question then arises, upon how many pounds is the tithe to be taken. These premises are not in lease. No rent therefore is reserved. All the property is in the occupation of the owners. Upon what is the payment to be? The plaintiff says, the tithe of property in the occupation of the owner is to be paid upon the value of the premises, to be let: or at least that must be the rule, where the property does not exist in the same state, in which it ever has been let. That is the *case of all the property. None exists in the same * 21
form, in which it ever paid rent: these buildings being all newly erected, the premises are materially altered: as to some the rent last paid is known: as to others that is not known. The defendants say, as to buildings, standing upon the site of those, as to which the last rent is known, the payment is to be upon that last rent only: as to the others, upon the site of buildings, of which the last rent is not known, I understand them to say, they are to pay no more than the tithe, which may be presumed at 2*s*. 9*d*. in the pound upon the last rent. Upon the words it is more easy to contend, that the owner of a house is not to pay any tithe, than that he is to pay according to the

1806. rent of the last house, that stood upon the site; for, if rent is to be the criterion, how is the rent of one house a criterion for the tithe of another; merely because a site is the same? The two houses might be very different, and might be let at very different rents.

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The expression of the statute is, "that every owner occupying himself shall pay after the quantity of such "yearly rent as the same was last letten for without fraud "or covin."(a) The owner might say, his house never was let; and therefore there being no rent, at which it was last let, it is not liable to any tithe; and it is difficult upon this clause of the statute to maintain the claim of tithe for new houses, occupied by the owners. Yet it seems strange that the rector, entitled to tithe for the old house, should lose his right to any tithe, merely because a new house has been built in its place: all other circumstances remaining precisely the same. The plaintiff *contends, that in cases, to which none of the provisions of the statute apply, the rector's claim rests upon the first general enacting clause; making all houses, generally, liable to tithe. If the general object was to subject all houses, particular words are to be construed so as to give effect to the general purpose. With reference to that there is no reason for the distinction between houses let, and not let, that has been suggested. Great incongruity would arise from that; and the words are large enough to include both. The express exemption of some houses, that never have been let, forcibly implies, that, if that exemption were not expressed, all houses whether let, or not, would be liable. But then the difficulty occurs, that the payment is to be according to the rent: therefore where there is no rent, no tithe is due. But upon the whole less violence is done to the statute by construing the word, "rent" in different senses, as it is used in different clauses, than by holding all houses that never were in lease, to be out of the statute.

(a) Sec. 4.

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But this is a difficulty, with which I have not to encounter; for in this respect, the construction is settled by decision; upon which "rent" means either actual rent, or estimated rent, with reference to the value, according to the statute to which it is applied; and in opposition to that there is nothing but a *dictum* of Lord *Coke*,(a) for it is not the point in the cause, that where houses were not let, that is *casus omissus*, and no tithe is payable. The first case referred to, contains a general declaration as to the construction, *Ivatt* v. *Warren*,(b) in 1618. The question was, whether a house, erected upon the site of a shed which paid no tithe, was liable to any tithe. The defendant contended *that the house was not liable to any tithe; but, if that defence should fail, he set up a particular agreement for a composition. The Court declared that the meaning was, that the inhabitant ought to pay according to the true value the same was worth to be let; and if the building had been a shed, it ought to be discharged no longer than it continued a shed; and being converted into a dwelling-house, it ought to pay tithe, and the decree was accordingly for 2*s*. 9*d*. in the pound, with costs. In that case the proposition is laid down as to new-built houses, where sheds formerly stood, in general terms, without regard to the circumstance, whether the house was let or not; that the exemption, allowed to the shed, is at an end the moment a dwelling-house is substituted; that tithe attaches upon it as a dwelling-house, and it is not a necessary proposition that it should be let.

(a) 2 *Inst.* 660.

(b) 3 *Gwil.* 1054.

The case of *Grant* v. *Cannon*(a) proves, that in the occupation of the owner the payment for tithe is to be according to the value, admitted in that instance to be 60*l*. *per annum*. No inquiry was directed, at what rent the house had been last let, or what tithe was last payable: but the declaration was, that the defendant must pay at the rate of 2*s*. 9*d*. upon the value confessed in answer. There are a great number of cases, in which the decree has been expressed in these terms; that the defendant shall account

(a) 2 *Gwil.* 541.

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and pay after the rate of 2s. 9d. in the pound for the yearly rent or value of their premises. I do not understand the Court to mean, that where there is a yearly rent, recourse shall be had to the value: but the meaning is, that the defendant is to account according to the rent, if there is rent; and according to the value, if there is no rent. Upon
* 24 *any other supposition it is very difficult to introduce the word "value" in such a number of decrees; for that word is not in the statute. The Court therefore, introducing it in the decree, understands the true construction of the statute to be, that the word "rent" may bear the double sense, "reserved," or "estimated" rent.

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(a) 3 Gwil. 902.

The case of *Williamson* v. *Gosling*,(a) is precisely in point. That case, like this, arose upon new buildings erected upon the site of old houses. The defendant set up a customary payment, to protect himself from the claim of the full statutory tithe. He established that as to three of the old houses; and the Court seem to have held, that a customary payment protected any houses upon the same site; as the premises were altogether out of the statute, if any customary payment at the time of the statute was established. The defendant failed in establishing any customary payment as to the fourth house. Then according to what is now contended, the question would have been, at what rent that fourth house was last let; and the payment ought to have been accordingly. But no such inquiry was made; for the Court immediately decreed, that the defendant should account and pay at the rate of 2s. 9d. in the pound for the premises, where the old house once stood, according to the yearly value; and took it so clear, that the decree was made against the defendant with costs. There is no distinction between that case and this. Upon all the ground occupied by the defendants' buildings of some description formerly stood. Of some the former rent is known. As to others it is not known. But that is not the point of the inquiry according to this decree. The
* 25 point is, what *is the value of the buildings erected in lieu

of those which formerly stood there? If the statute had not received a construction, I should have thought it necessary to put this construction upon it; in order to make it consistent: but, if I had any doubts, these authorities would have overruled them.

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The decree was made for payment at the rate of 2*s.* 9*d.* in the pound upon the value, and a reference to the master was directed accordingly.

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## MASON *against* ARMITAGE.

*July* 25, 26.

Specific performance of an agreement the subject of discretion: refused therefore, in the case of mistake; though no fraud.

THE bill stated, that the defendant *Armitage* put up to sale by auction at *Norwich*, on the 7th of *August*, 1802, a freehold and copyhold estate; that there were several bidders; and the plaintiff, being the highest bidder, at the sum of 8,000*l.* the estate was knocked down to him at that sum; and he was declared the purchaser. The plaintiff, after the sale was concluded, tendered the deposit, and a moiety of the auction duty to the auctioneer, according to the conditions of sale: but the auctioneer declined to take the money; as the vendor seemed dissatisfied with the sale; and, as auctioneer and agent for the defendant, made and signed the following memorandum on the printed particulars and conditions of sale:

"Memorandum: *Saturday* the 7th of *August*, 1802;
"attended at the *Blue Bell* on *Hoghil*, *Norwich*. Mr.
"*Robert Mason* was the highest bidder at the sum *of 26
"8,000*l*: the deposit being 10 *per cent.* upon the purchase
"money. Mr. *Mason* offered me 800*l.* for the same, as
"well 100*l.* for his moiety of the auction duty: but the
"owner nor his attorney being present, I did not think
"proper to receive the same. *R. Bacon*, auctioneer."
Then, after the names of persons who were present,

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"N. B. There was a misunderstanding between the "vendor and the person appointed by him to bid for the "estate."

The bill prayed a specific performance of the agreement, and a conveyance, &c.

To this bill the defendant *Armitage*, put in a plea of the statute of frauds; (*a*) with averments, that no contract or agreement for the sale of the freehold and copyhold estate in the bill mentioned, or any part thereof, or any interest in or concerning the same, nor any memorandum or note thereof, was in writing signed by this defendant, or any person by him thereunto authorised; for this defendant saith, that although the memorandum in the said bill mentioned to be signed by *Richard Bacon*, the auctioneer therein mentioned, may have been signed by the said *Richard Bacon*, yet the said *Richard Bacon* was not at the time, when he signed the said memorandum, authorised by this defendant to sign the same; and this defendant avers, that immediately upon the said estate's being at the auction knocked down to the plaintiff, and before the said memorandum was signed by the auctioneer, this defendant, in the presence and with the knowledge of both the auctioneer and the plaintiff, revoked all the authority whatsoever,
27 *which the defendant had committed to *Bacon*, his auctioneer and agent; and thereupon thenceforth disallowed all and whatsoever *Bacon* should sign or do for the defendant in and about the agreement and sale of his estate to the plaintiff; and the defendant insists that the said memorandum, signed by *Bacon*, is not such a writing signed as is within the meaning of the statute; especially as the same was signed without the authority of this defendant.

(*a*) Stat. 29 *Car.* II. c. 3.

This plea was argued upon the 31st of *January*, 1806; when it was ordered to stand for an answer, with liberty to except, saving the benefit of the plea to the hearing: the Lord Chancellor(*a*) observing, that the plea was rather

(*a*) Lord *Eldon*.

novel in the form; and that the defendant ought to have stated the fact, which he implied in the term "revoked."

The circumstances upon which the bill was resisted, according to the evidence of the auctioneer, and other persons present at the sale, were these:

*Armitage* in the usual way, by writing, appointed *William Rising* to make one bidding for him; there was an interval of 17 minutes between the time of *Mason's* last bidding, and the time when the estate was knocked down to him. After that bidding, the auctioneer laid a watch upon the table; and said, if no farther bidding was made, it would be necessary for him to call on the person appointed to bid for the owner, to make his bidding if he thought proper. After waiting about seven minutes, the auctioneer inquired of the persons present, if they were inclined to make any farther offer, addressing himself to each individual; to those who were *known to him by name; and particularly to *Rising*, by pointedly looking at him: he being the person who was authorised to make the reserved bidding, and to bid once on the part of the owner; and the auctioneer said, "it is with your free will and consent "that the estate shall be knocked down at 8,000*l.* to Mr. "*Mason*;" and *Rising*, who sat upon the same seat with *Armitage*, making no motion whatsoever, the auctioneer asked the company at large, whether any one of them chose to make any farther advance on the last bidding; observing at the same time, that the seller had made no bidding: but no farther offer being made by any person present, and *Rising* still taking no notice, after some farther pause the estate was knocked down. Immediately after the auction was finished, *Rising* remonstrated with the auctioneer; insisting, that he had no right to knock the estate down to the plaintiff, as he (*Rising*) expected to have been called upon by name; and said to the plaintiff, that as he (*Rising*) had made this mistake, he would give the plaintiff 100*l.* out of his own pocket to relinquish the estate, rather than

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the vendor should be a sufferer on his account. In the course of the sale, the auctioneer being asked, whether there were any setters in the room, answered, not that he knew of; but that the vendor had reserved one bidding for himself; and that the company should know, when he made that bidding; and after that bidding, any person making an advance of 10*l.* should be the purchaser. The auctioneer, being farther asked, who was to bid for the vendor, said, he was not at liberty to give up the name.

*Rising*, by his deposition stated, that great intimacy subsisted between the plaintiff and the defendant *Armitage;* and previously to the sale, on the same day, *Armitage* told the plaintiff he had appointed *Rising* to buy the
* 29
estate in for him at 9,000*l.* and would not take *less; and that the plaintiff had better take the estate for his friend. The plaintiff replied that he had no money; and would have nothing to do with it either for himself or his friend. *Rising* also stated, that he expected to be called upon by name; and did not conceive the general call upon the company to be addressed to him; otherwise he would have bid 9,000*l.*

Mr. *Perceval* and Mr. *Cooke*, for the plaintiff.

With reference to the fourth section of the statute of frauds,(*a*) it is sufficient to establish, that the auctioneer had authority to sell; and that, having that authority, he made a memorandum in writing. The result of the evidence is, that there was no fraud in this transaction. There is nothing in the practice of auctioneers, requiring that *Rising* should have been called upon by name. Nothing more was necessary than that he should have a full, fair, and free opportunity to know the state of the sale, that he should not be taken by surprise. It will be contended, that the auctioneer should have considered himself as divested of the authority, given to him to dispose of the estate, by the countermand given to him, before he signed

(*a*) *Stat.* 29 *Car.* II. c. 3.

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the memorandum: but, signing that memorandum, he was acting under the authority clearly given to him before. The contract for sale was completely closed by the act of knocking down. Until that moment it has been held, that there is *locus pœnitentiæ* to each party: the bidder may withdraw as well as the vendor. But the authority of this auctioneer was not withdrawn, until the contract was completed. The object of the statute was to secure sufficient evidence of the contract; not of the authority to sell, which may be by parol.(*b*) It *was the intention to alter the nature of the evidence, not of the contract.

(*b*) *Ante*, vol. 9. p. 250. *Coles* v. *Trecothick*.

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Except two late cases before the Master of the Rolls, *Buckmaster* v. *Harrop*,(*a*) and *Blagden* v. *Bradbear*;(*b*) the former of which is now under appeal, there is nothing to support the proposition, that a sale by auction is within the statute, requiring a note in writing. All antecedent authority is the other way. In *Simon* v. *Motivos*(*c*) Lord *Mansfield* considered the statute as complied with by the auctioneer putting down the name of the bidder, with the sum. In *Buckmaster* v. *Harrop* the judgment of the Master of the Rolls goes upon the authority of *Walker* v. *Constable*,(*d*) which is not a judgment of the Court upon this point, and *Stansfield* v. *Johnson*,(*e*) merely a determination at *Nisi Prius*. The authority of *Simon* v. *Motivos* therefore has been too hastily departed from. The two clauses of the statute as to land and personal chattels cannot be distinguished.

(*a*) *Ante*, vol. 7. p. 341. *post*.
(*b*) *Ante*, vol. 12. p. 466.
(*c*) 3 *Burr*. 1921. 1 *Bl. Rep*. 599.
(*d*) 1 *Bos. & Pul*. 306.
(*e*) 1 *Esp*. 101.

That question however does not arise in this instance; as here is a written memorandum, made by a person, duly authorised to enter into the contract. That authority, complete and perfect in its origin, remains with the person, to whom it was given, for the purpose of effecting and carrying into execution the contract; and could not be countermanded between the periods of the sale and establishing the binding evidence of the fact: nothing remaining to be done but to give that evidence of the contract,

1806. Mason v. Armitage. already completed. The attempt of the vendor at that time to prohibit the agent, whom *he had duly authorised to sell, from giving evidence that the sale was duly made, is inconsistent with good faith. This is a prohibition to an
31 agent, legally authorised, from giving evidence of the fact he had done. The effect in depriving the party with whom the contract is made, of the evidence by which he is to prove it, may be compared to the act of suppressing a will.

(a) *Ante*, vol. 9. p. 234.

In *Coles* v. *Trecothick*,(a) Lord *Eldon* discusses all these cases; and held clearly, that it is not necessary to constitute an agent by writing; but expressed great doubt upon the distinction that is attempted; dissenting from the opinion of Lord Chief Justice *Eyre*. The case of *Payne* v. *Cave*(b) establishes the *locus pænitentiæ* before the lot is knocked down, and confines it to that point of time. The instant the hammer is down the duty attaches. Considering this merely as a parol agreement, all the facts are admitted: certainly with a plea of the statute; which was not allowed, but was permitted to stand for an answer, with liberty to except. The question, whether a parol agreement being admitted by the answer, though with a plea of the statute, the Court will compel a specific performance, though raised and discussed in the case of *Cooth* v. *Jackson*,(c) has not been determined.

(b) 3 *Term Rep.* 148

(c) *Ante* vol. 6. p. 12.

The *Solicitor-General*, for the defendant *Armitage*; Mr. *Fonblanque*, and Mr. *Hall* for the purchaser from him.

This Court will not give this extraordinary assistance, by compelling a specific performance, unless the contract is under circumstances perfectly fair, without advantage
32 taken of mistake or ignorance. Under these *circumstances the Court would decree this contract to be delivered up. A specific performance will not be decreed, where the party seeking it has put himself in the situation of an agent, or has so interfered with an agent as to acquire

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knowledge. This plaintiff by holding out to the defendant, that he would not bid for the estate, acquired the knowledge, that the vendor would not let it be sold for less than 9,000*l.*; therefore, that there was to be no real bidding until it reached that sum. At least the plaintiff endeavours to take advantage of a mistake; having thus acquired a knowledge of the facts; and insisting upon the strict law: the mistake declared the instant the hammer was down. The distinction between the relief by delivering up a contract, and decreeing a specific performance, is plainly marked by *Savage* v. *Taylor*,(a) and the strong case, *Day* v. *Newman*, before Lord *Alvanley*, of a bill and cross bill, both dismissed.(b) According to *Twining* v. *Morrice*,(c) any thing that chilled or damped the sale, is sufficient to repel a specific performance; and that principle has been followed by Lord *Eldon* in *Mortlock* v. *Buller*.(d)

(a) *For.* 234
(b) *Ante*, vol. 10. p. 300. *Mortlock* v. *Buller*.
(c) 2 *Bro. C. C.* 326.
(d) *Ante*, vol. 10. p. 292.

With respect to the question, whether a sale by auction is within the statute, except the late case(e) at the Rolls, there is no authority but *Simon* v. *Motivos*;(f) in which case Lord *Mansfield* expressly declines to give any opinion upon it. The action was brought against the purchaser; and Lord *Mansfield* by a refined fiction, considering the auctioneer as the *agent of both parties, held, that the name of the purchaser being put down by the auctioneer, the statute was complied with. But that case cannot be an authority for this: the auctioneer not putting down the name of the vendor, who, in this instance, is the party to be bound. The case of *Buckmaster* v. *Harrop*(a) involves other points, that may exclude the question, whether a sale by auction is within the statute of frauds. The statute adopts the largest terms, and has no exception. The late case of *Blagden* v. *Bradbear*,(b) decides both points: 1st. That sales by auction are within the statute: 2d. That the vendor may at any time before an agreement in writing withdraw his authority.

(e) *Blagden* v. *Bradbear*, *ante*, vol. 12. p. 466.
(f) 1 *Black. Rep.* 599. 3 *Burr.* 1921.

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(a) *Ante*, vol. 7. p. 341 *post*.
(b) *Ante*, vol. 12. p. 466.

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Upon the question, whether there is an agreement in writing by an agent, lawfully authorised, this appointment which was merely verbal, was revocable, and would have been so, even if it had been by letter of attorney. A submission to arbitration may be revoked at any time before the award, however that may violate good faith, and even though the party may be liable to an action: so letters of attorney, though declared to be irrevocable; and though upon a covenant not to revoke, an action would lie. The answer to the objection, that this is only preventing evidence of the fact is, that the defendant may plead the statute to the discovery; that species of dishonesty not being controuled in such cases. But the object of the statute was to keep the party free from obligation, until certain forms were observed. Therefore there is nothing immoral in the resistance. The transaction is mere negotiation, until the terms are put into writing, and signed; and that is the consequence of the law, which is perfectly understood.
34 There is no doubt *the party had a right to refuse to sign the agreement, and therefore he might prevent his agent. If the book was evidence, the mere circumstance of the bidding, taken down by the auctioneer, is not sufficient evidence of an agreement. The payment of the deposit is a condition precedent; and, until that is done, nothing is completed. Instead of the agreement in writing required by the statute, here is a protest against agreement. The attempt, frequently made, to render powers of attorney irrevocable has failed. Every power, not accompanied with an interest in the party to whom it is given, is revocable. Here is a distinct declaration by the plaintiff, that he does not mean to bid; the consequence of which is, that confidence is put in him by the vendor, and information as to the value is thereby obtained. As to the acts, imposing duties upon sales by auction, in the *Attorney General* v. *Christie* it was contended in vain, that, after the lot was knocked down, the bidder might not perform his part of the contract by paying the deposit. The answer, given by Lord *Rosslyn*, was, that the defendant must obey

the act of parliament, and the judgment of the Court of Exchequer was affirmed; upon the principle, that the duty was not upon the sale, but upon the bidding, and was personal to the auctioneer; and any hardship by the failure of the bidder to fulfil his engagement was a hardship, against which the Legislature did not provide. 1806. Mason v. Armitage.

The *locus pœnitentiæ* remains up to the time of actual signature: whether by the party himself, or his agent, there is no difference. Without that there is no contract. The revenue laws make no difference between the parties. That point is particularly considered by the Master of the Rolls in *Buckmaster* v. *Harrop*.(a)

(a) *Ante*, vol. 7. p 341 *post*.

*As to the admission of an agreement by the answer, insisting also upon the statute, the result of the authorities, which were much considered in *Cooth* v. *Jackson*,(a) is, that it is a good defence; and the agreement has been executed, only where the statute was not insisted on. * 35

(a) *Ante*, vol 6. p. 12.

Mr. *Perceval*, in reply.

Upon the result of the evidence there is no fraud. All the knowledge acquired by the plaintiff was acquired before he intimated an intention not to be a bidder. There was no confidence between these parties. In *Simon* v. *Motivos*,(b) the opinion of Lord *Mansfield* is strongly expressed; and if the case had called for a decision of the point, it would have been decided. There is no ground for the distinction between land and personal chattels. Lord *Mansfield's* opinion is therefore fortified by the subsequent cases. The case of *Mortlock* v. *Buller* turns upon a very different principle: a contract entered into by an agent, not a due exercise of his authority. The alteration made by the statute respects the evidence, not the contract. Authorities, in their nature revocable, are in many instances not permitted to be revoked; as in the case in *Latch*.(c) The auctioneer has an interest that entitles him to carry

(b) 3 *Burr.* 1921. 1 *Black. Rep.* 599.

(c) *Latch.* 8.

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on his authority to the end; being bound himself to pay the duty.

The Lord Chancellor.

The view I take of this case does not make it necessary to come to a decision, as it relates to the statute of frauds. That is satisfactory, as there is a case(*d*) *now depending upon appeal, which involves the important doctrine belonging to that subject. I shall therefore only observe, that no authority has yet decided, that sales by auction, in the abstract, without reference to the peculiar circumstances of any particular case, are not within the statute. In the case of *Simon* v. *Motivos*(*a*) that point was not before the Court. The ground that has been suggested, that sales by auction were much less frequent at the date of the statute than at this day, when the commerce of the country has reached its present flourishing state, and thence considerable difficulty may arise by adhering to all the strictness of the statute, is for the consideration of parliament. It is said in the report, that the preamble shews the intention: but the law is, that if the enacting part will bear only one interpretation, the preamble shall not confine it. If that is doubtful, then the preamble may be applied to throw light upon it.(*b*) If the statute relates to personal estate, it relates to land also; for the words of the 4th and 17th sections, the one as to lands, the other as to goods, are precisely the same.

(*d*) *Buckmaster* v. *Harrop*, ante, vol. 7, p. 341, post

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(*a*) 1 *Blac. Rep.* 599; 3 *Burr.* 1921

If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it: if doubtful, the preamble may be applied to throw light upon it.

But in this case I am not called upon to look at the statute. I admit there is nothing in this contract, shewing, that any thing was fraudulently obtained by the plaintiff; and if he had been declared the purchaser, and had got into possession, so that the defendant had been obliged to come into this Court upon the head of fraud, there would not be sufficient ground to deprive the plaintiff of the benefit of his legal contract. But that *is not this case. This plaintiff has got all the law can give him; and applies here,

(*b*) So, where the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain. 1 *Ves.* 365.

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desiring more; and the question is, whether, under all the circumstances, and upon the authorities and principles, this is a case for a specific performance.

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As to the cases that were cited, independent of the authority of Lord *Kenyon*, I find a more ancient authority. The same rule is laid down by Lord *Hardwicke*, particularly in the case of *Underwood* v. *Hitchcox*.(a) A specific performance is so much matter of discretion, that it is very rarely, at least, granted in the case of personal chattels. In the case(b) of a bill, filed for the performance of an agreement to transfer stock at a given day and price, in consideration of two guineas, the decree was made: but it was upon appeal reversed by Lord *Parker*, who said the plaintiff should go to law for damages, one man's stock being the same as another's. It is not necessary that fraud should be made out. Though from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, this Court will not, especially if upon other circumstances the case is hard, decree a specific performance: but the law is open to him: *Joynes* v. *Statham*.(c) Upon this subject the Court is governed by a sound, not a capricious and arbitrary discretion.

(a) 1 *Ves* 279.

No specific performance of an agreement to transfer stock.

(b) *Cud* v. *Rutter*, 1 *P. Wms.* 570.

(c) 3 *Atk.* 388.

In this case I cannot say the plaintiff has acted so as to be an example; though his conduct does not come up to fraud, so that I could have dealt with it as such if he had obtained possession. It is plain he had talked of purchasing it for his friend; and his answer to the offer made to him, that he would have nothing to do *with it, is rather *38 against him; the defendant on that account not looking to him as a purchaser. Having thus put the defendant off his guard, the plaintiff went into the room, and was considered by every one as a puffer. This is not a damp upon the sale by a circumstance, over which the man had no controul; as in *Twining* v. *Morrice*.(a) This arises from his own act. Upon the suspicion that the plaintiff was a puffer, the question was put whether any puffers were present;

(a) 2 *Bro. C. C.* 326.

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and then a fair account is given by the auctioneer, that the defendant had reserved one bidding, and any one who would advance 10*l.* upon that should have the estate. This was not private, but a public conventional option not to let the estate go at a particular bidding. The result of the evidence is plain misapprehension and mistake; not an after-thought by the defendant, satisfied at the moment with the sum of 8,000*l.* There is no difficulty as to the evidence, which is embodied upon the written memorandum, stating clearly that there was a misunderstanding. If, however, the plaintiff thinks he has a case which the statute will not meet, upon which I do not give any opinion, he is not injured by this decision. There is nothing to shew that this land is of any peculiar value to him; as if it was contiguous to his own estate, or purchased with a view to set up a manufacture. Therefore Lord *Parker's* observation as to stock is applicable; and as the plaintiff declared he did not intend to make this purchase, and he has obtained an advantage through a mistake, a Court of Equity will not give him any assistance in that.

Dismiss the bill without costs.

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* 39

ROLLS.
*May* 22.
*July* 29.

## *RAWLINS *against* JENNINGS.

The word "*effects*" in a will restrained to articles *ejusdem generis* with those specified, though the consequence was a residue undisposed of.

Bequest to the testator's wife of "200*l.* per year, being part of the monies I now "have in bank security, entirely for her own use and disposal," together with all his household furniture and effects: interests for life being expressly given to other persons.

An absolute interest to the wife in bank stock, sufficient to produce 200*l.* a year, not a mere annuity for her life.

Executors, with unequal legacies, not trustees for the next of kin of the residue undisposed of.

*JOHN JENNINGS* by his will, dated the 1st of *February*, 1805, after directing the payment of his debts, among others, made the following disposition:

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"I give and bequeath unto my wife *Alice Jennings* 200*l.* "*per* year, being part of the monies I now have in bank security, entirely for her own use and disposal, together with all my household furniture and effects, of what na-"ture or kind soever that I may be possessed of at the time "of my decease. I give and bequeath unto my son *Midg-*"*ley John Jennings* 2,000*l.* that I have in *East-India* "stock, and 1,900*l.* being part of the monies that I have in "bank security, called the New Fives, for his use during "his natural life, and if he should die without issue I then "give and bequeath to his widow, if living at the time of "his decease, the sum of 500*l.* and the remaining part to "return to my family. I give and bequeath to my daugh-"ter *Frances Rawlins*, wife of *William Rawlins*, 50*l. per* "year during her natural life, and after her decease the "same to be equally divided amongst my grandchildren, "sons and daughters of the said *Frances Rawlins*;" naming them. The testator then, after giving several pecuniary legacies to his said grandchildren, and other persons, appointed *Charles Danvers*, *Midgley John Jennings*, the son, and *Alice Jennings*, the wife of the testator, his executors and executrix; *the two latter of whom only pro- 40
ved the will; *Danvers* having renounced.

The testator died upon the 8th of *March*, 1805, leaving his wife, and the two children mentioned in the will, his only issue surviving. The bill was filed by *William Rawlins* and his wife *Frances*, claiming her annuity under the will; and insisting also that the testator died intestate as to the residue of his personal estate; and claiming accordingly, in the right of *Frances Rawlins*, as one of the next of kin with the defendants, *Midgley John Jennings* and *Alice Jennings*.

The defendant, *Midgley John Jennings*, by his answer, claimed the interest and dividends of the *East-India* stock and bank annuities under the will; and submitted the questions, whether the capital of those funds will upon his death

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without issue sink into the residue of the testator's personal estate, or not; and whether on his death, leaving issue, the said capital will or will not belong, and become payable to, and divisible between, such issue; and insisted, that *Alice Jennings* is not entitled to the capital of the stock, which will produce 200*l*. *per annum*; but is entitled only to the sum of 200*l*. *per annum* for her life. He also claimed a share of the residue, undisposed of, as one of the executors; or, as one of the next of kin.

The defendant *Alice Jennings*, insisted, that she was entitled, not only to the sum of 200*l*. a year for her life, but absolutely to so much stock as will produce 200*l*. a year. She also claimed the whole residue of the personal estate under the direct bequest to her; and, if not so entitled, she claimed a share of the residue undisposed *of, as executrix, or, under the statute of distributions.(*a*)

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(*a*) Statute 22 and 23 *Car*.II. c. 10. 29 *Car*.II.c.3.

The *Solicitor-General* and Mr. *Trower*, for the plaintiffs.

1st. The widow of the testator under the bequest to her of the 200*l*. a year, can take only an interest by way of annuity for life. If the testator had intended to give her capital stock, he would not have expressed his purpose in this way.

2dly. The bequest to the testator's son gives him expressly, an interest for life; and, whatever intention may be inferred in favour of his children, the only event in which the intention is expressed, is his death without issue. The construction of those words in this context must be restrained to issue living at his death; part of the fund being given to his widow, if living at the time of his decease; immediately upon which event therefore it was to go over. In such a case the interest for life, expressly given, cannot be enlarged by implication to an interest analogous to an estate tail; the event intended being clearly not an indefinite

dying without issue, but dying without issue living at the time of the death. In the case of land, an estate tail could not be raised by implication from such words.

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The third question is, whether a trust arises for the next of kin as to the residue, which cannot pass to the testator's wife under the general description of effects; which must be considered restrained to articles *ejusdem generis*, and not comprising the whole personal estate. Of the executors two have unequal legacies; the third has *no legacy. * 42
It is now clear, upon *Bowker* v. *Hunter*,(a) that executors, having unequal legacies, are not trustees for the next of kin. But, independent of that, a decisive circumstance appears in the bequest to the son: "the remaining part to return to "my family;" indicating a clear understanding that his family would be entitled to all which he had not before disposed of. Any indication that the executors are not to take the residue beneficially will make them trustees, and slight circumstances are now sufficient. The inference from that direction is irresistible, as *Danvers* certainly was not one of the family.

(a) 1 Bro. C. C. 328.

Mr. *Richards* and Mr. *Spranger*, for the defendant *Midgley John Jennings*, the son of the testator, upon the first point concurred with the plaintiffs; and observed, that the second question, whether the son took a vested, absolute interest in the specific bequest of *India* and bank stock, upon the general intention, the limitation over being too remote, that it should not fall into the residue, if he should leave issue, was not ripe for determination; as there was no party to maintain the interest of the issue.

3dly. The executors are clearly not excluded by unequal legacies; and there is no expression in the will necessarily taking away what is cast upon them by law, and marking an intention that they were to be trustees. The inference from these words, "and the remaining part to return to "my family," is too refined. They cannot ascertain whom.

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he meant to describe, nor to what time the description referred; whether persons living at the testator's death, or at the period of distribution, were intended.

* 43 *Mr. *Raithby*, for the defendant *Alice Jennings*, the widow of the testator, contended, that she was entitled to have so much capital stock as will produce 200*l.* a year: that disposition being coupled with the bequest of the household furniture, and the general disposition of his effects; as to which it was not argued that her interest could be restrained to her life. In this will, where an interest for life only is intended, it is plainly expressed. In *Coxe* v. *Basset*(*a*) the words "for her entire use," were considered as passing the whole fund, not an interest for life only. *Hogan* v. *Jackson*(*b*) is another instance of the effect of general words to pass the whole interest. The intention of intestacy cannot be presumed.

(*a*) *Ante*, vol. 3. p. 155.

(*b*) *Cowp.* 299.

2dly. The effect of these very general words, unrestrained, is a complete residuary bequest to the wife. These general words cannot be restrained to articles *ejusdem generis*; all the cases of that sort turning upon locality. In *Woolcom* v. *Woolcom*,(*c*) and *Wilde* v. *Holtzmeyer*,(*d*) there was an express bequest of the residue. In *Cook* v. *Oakley*(*e*) the reason is, that the testator, being at sea, did not know that he had that leasehold estate. In *Timewell* v. *Perkins*(*f*) there are restraining words. A debt by bond has been held to pass by a bequest of all his goods.(*g*)

(*c*) 3 *P. Wms.* 111

(*d*) *Ante*, vol. 5. p. 811.

(*e*) 1 *P. Wms.* 302

(*f*) 2 *Atk.* 102.

(*g*) Anon 1 *P. Wms.* 267.

The *Solicitor-General*, in reply.

The bequest of the stock to the wife is a mere question of construction, and cannot amount to more than an interest for life. That is not given in the same *way as the furniture. The testator has not given a capital to produce that fund, as he has given the actual furniture, not the use of it merely. If it had been expressed in that way, the bequests would have had a resemblance; but then the ar-

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gument would have been, that she was not to have the furniture absolutely. The obvious way of giving capital stock is to give it expressly, not in this way. It is true a devise of rents and profits has the effect of a devise of the estate, but then the analogy to real estate must be pursued throughout.

It is not disputed that the word "effects" will pass all the personal estate, if the general sense of that word is not restrained, as it may be certainly. That word however is not the most natural and proper, according to the legal sense, to express all the personal estate. The words "goods and chattels" are much more proper. In general, a man speaking of his "effects" means, not debts due to him, choses in action, but visible, tangible property. This word is not only combined with the bequest of household furniture, but is followed by dispositions inconsistent with the intention to pass all the property in that general way. This is not given as a residuary disposition. The supposition is, that the will setting out in this way, the testator in the first instance gives the whole; no residue being left to answer the several specific dispositions that follow. Upon this construction, every thing being given to his wife, what could he mean by the direction, that part should *return* to his "family?" Having two children, he could not by that word mean his wife alone.

As to the claim of the executors, though unequal legacies will not make them trustees, they must be so upon the plain intention, that the property should go *to his family, * 45
and not to his executors. He conceived that it was not necessary to express his intention as to what was not particularly disposed of, as without that it would return to his family; and upon that alone the Court will make the inference against the executors.

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(a) The judgment *ex relatione*.

(*a*) The MASTER of the ROLLS.

This will is very obscure. The first question that arises upon it is, whether the testator's wife takes only an annuity of 200*l.* for her life, or so much capital stock as will produce 200*l.* a year. The description of the subject of this bequest, "part of the monies I now have in bank security," is the correct mode of giving the absolute property in stock; for strictly the proprietor of stock has an annuity only, and no capital. It is impossible to satisfy the words of this bequest without giving the wife the absolute interest in something, which the testator had in bank annuities. The words "entirely for her own use and disposal," are material. The word "disposal" seems to be intended to confer a power of disposition after her death: but, the will being in general incorrect, it might be improper to lay too much stress upon any expression, as being used in the accurate sense; if there were any words having an opposite tendency.

It was argued, that where the testator meant to give an interest for life only, he has done so in the plainest terms; using the words, as in the bequest of the annuity to his daughter, "during her natural life." This difference of
46 disposition is a circumstance, whence a *difference of intention may be collected. The testator's wife also was to take absolutely the furniture and the effects, which are coupled with that, and given to her in the same clause. All this is in favour of the widow; who is therefore entitled to the absolute interest in so much capital stock as will produce to her 200*l.* a year.

The second question arises upon the widow's claim of the whole residue of the personal estate, as passing to her under the general word "effects." That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word "effects" must receive a more

limited interpretation; and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence: *viz.* household furniture.

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The next question is, what is to become of the residue; which is not in terms disposed of. To one of the three executors the testator has not given any legacy. But that executor disclaims. The other two, the wife and son, have unequal legacies. They are therefore not excluded by legacies; and are entitled by their legal right, as executors, unless there is something in the will to raise a trust.(*a*) The words after the bequest of 500*l.* to the son's wife, "the remaining part to return to my family," were much relied on. It is not easy to say, what he meant by the word "family." Supposing he meant his next of kin, this relates only to the stock given to his son; and does not shew an intention with reference to any part of his property, except that specific residue. The widow and *son, 47 therefore, must take the general residue beneficially. It is unnecessary at present to determine, as to the funds bequeathed to the son, what is to become of them in the event of his death, leaving, or not leaving issue. If he shall leave issue, the question will arise, whether he might not dispose of them; or, whether his issue will be entitled to them. If he shall not leave issue, they are given over. Declare the son entitled during his life; with liberty upon his death for any party who is interested, to apply.

(*a*) See *Griffiths* v. *Hamilton*, *ante*, vol. 12. p. 298. and the references.

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*July* 28, 29, 30.

## LADY ORMOND *against* HUTCHINSON.

Account against a confidential agent, in possession of estates since 1780, without giving any account to his principal, residing in *Ireland*; and an inquiry into the circumstances of a lease granted under his direction, and in which he took an interest.

Where the answer to a bill for discovery only is used as evidence, the whole must be read.

Where relief is prayed, and the answer replied to, the plaintiff reading admissions, must proceed to the completion of the immediate subject, to which the defendant is answering; according to the course of evidence at law; but this does not apply to distinct matter

THE bill in this cause was filed by an heir at law, seeking relief against the defendant on different grounds: 1st. That as steward of Lord *W.* he had been in possession of considerable estates, without rendering any account since 1780; though called upon by his principal, who resided in *Ireland:* 2dly. As to a lease for 21 years, granted to *Lodge;* 3dly. As to a lease in reversion of the same premises for 21 years from the expiration of *Lodge's* term, obtained by the defendant; that the leases may be set aside, and that the defendant may account, and be charged with an occupation rent. The lease to *Lodge* was not produced; but by the admissions in the answers it appeared to have been granted upon the proposal of *Lodge*, to pay a clear rent of 900*l.* a year; the tenant giving security for [* 48] *the rent; and proposing an extensive plan of improvement; erecting barns, and other buildings, fencing the woods, &c. The defendant, soon after *Lodge* became tenant, acted as agent to him; and took an underlease from him of part of the premises. The reversionary lease was obtained by the defendant at a trifling increase of rent; and contained only the ordinary covenants. The defendant admitted that he was the confidential agent and adviser of Lord *W.* with reference to his property.

*The Solicitor-General*, Mr. *Richards*, and Mr. *Whishaw*, for the plaintiff.

Upon the question of interest, at least an inquiry must be directed. Lord *Eldon*, in Lord *Chedworth* v. *Edwards*,(*a*) states, as one important question, whether a steward under such circumstances ought not to pay interest; observing, that in the only case between a person of great

(*a*) *Ante*, vol. 8. p. 46.

property and his steward, Lord *Salisbury* v. *Wilkinson*,(b) Lord *Thurlow* held, that the defendant could not be liable to interest under the circumstances, that he had by the desire of his principal kept the money in his hands; for which he was to be responsible from time to time, and duly account. It cannot be supposed, that this defendant, an attorney, did not make interest; and even if he kept the money at his banker's, that will not excuse him.(c)

(b) Stated, *ante*, vol. 8. p. 48.

(c) *Ex parte Hilliard*, *ante*, vol. 1. p. 89. *Rocke* v. *Hart*, *ante*, vol. 11. p. 58.

This is to be considered as a transaction between trustee and *cestui que trust*, which may take place; provided the latter has the benefit of that protection, which the trustee is bound to give him; and is fully *apprised of all the circumstances.(a) The principal is disarmed by the knowledge and skill of the steward. The suspicion that arises from the relative situation of these parties, is confirmed in this instance by the residence of the principal at a considerable distance in another country. The defendant admits, that the most unlimited confidence was placed in him; that he was the confidential agent and adviser of his principal with reference to his property; having the uncontrouled dominion over those estates as if he was the absolute owner; dealing with the property as his own, without communication with his principal. A steward is to all intents and purposes a trustee in the contemplation of this court; and every rule, prevailing between trustee and *cestui que trust*, is applicable to the case of principal and steward: *Beaumont* v. *Boultbee*,(b) in which Lord *Rosslyn's* decree was reheard, and affirmed by Lord *Eldon*. The case of the attorney, *Gibson* v. *Jeyes*,(c) rests upon principles perfectly analogous to this. A steward and confidential adviser cannot be in a better situation.

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(a) See *Coles* v. *Trecothick*, *ante*, vol. 9. p. 234. *Morse* v. *Royal*, *ante*, vol. 12. p. 355, and the references.

(b) *Ante*, vol. 5. p. 485. vol. 7. p. 599. vol. 11. p. 358.

(c) *Ante*, vol. 6. p. 267.

An important branch of this case is the reversionary lease. That is against all policy. It contains no covenant for improvement; not even a covenant, that a valuable house shall be kept in repair. It has only the common

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covenants, that are in the most ordinary lease. What is the compensation at the expiration of forty years for the extravagant act of granting a reversionary lease of this nature? While the value of all the rest of the estate has increased in a triple proportion, that *part which was in the
* 50
defendant's own occupation, remains just as it was 30 years ago, let now at one third of its value. Is a nobleman, with great landed property, setting his name to a lease presented to him by his steward, to be considered as bound by every fact, stated in that lease? Can such a person be supposed to read every lease, presented to him for execution? If the transaction was recent, there could be no hesitation as to the proper decision. The only difficulty is from the length of time, which has effect either by some analogy to the statute of limitations; or, as the defendant, submitting to account, would be in a situation, in which he ought not to be placed by the laches of the party, calling for the account. There are many cases of that nature: but no such inconvenience occurs in this instance. There cannot be any vouchers. The question is merely, whether this person shall pay more or less rent; and in the account he will have the benefit of all substantial improvements. The decree must therefore be made for an inquiry, with the usual direction, that the master shall be at liberty to state any thing special that shall come out in the course of the inquiry, and shall appear material.

The objection taken to the use that has been made of the defendant's answer, cannot be supported. With the single exception of the rule, that a decree cannot be obtained upon the evidence of one witness against the positive averment of the answer,(*a*) the rules of evidence in equity and at law are not different. Here, as well as at law, if any instrument is used as evidence against a party,

(*a*) As to that rule, with its qualifications, see *The East-India Company* v. *Donald*, *ante*, vol. 9. p. 275. and the references.

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the whole of it must be taken. But *when passages are read from an answer, which is replied to, it is not produced as evidence against the defendant: but passages are read to shew, what he has admitted; as to which therefore it is unnecessary to produce evidence: as to the rest the plaintiff, having replied to the answer, puts him upon proof. Upon a bill for discovery only, the answer being produced as evidence, the whole of it must be read; not a part only.

The *Attorney-General*, and Mr. *Heald*, for the defendant.

The Lord CHANCELLOR.

The principle upon which this Court acts, giving the relief in these cases, is plain; and, I think not new. The jurisdiction is most beneficial, proceeding principally upon those confidential situations in life, in respect of which this Court assumes a guardianship over mankind: where a breach of confidence has been committed; advantage taken of men, unguarded in particular situations, and under circumstances, such that the Courts of Law, though fraud, according to the ordinary understanding of the term, is equally the subject of their jurisdiction, cannot give an adequate remedy: a Court of Equity, for instance, prohibiting a party from taking advantage of an instrument obtained under such circumstances; which a Court of Law has not the means of avoiding. In the case of *Beaumont* v. *Boultbee*,(*a*) which resembles this, Lord *Rosslyn*, and Lord *Eldon* have not laid down any new principle. Every case of this kind must stand upon its own circumstances; and the Court will try the application.

(*a*) *Ante*, vol. 5. p 485 vol. 7. p. 599.



Relief against a deed of gift by a client to his attorney.

*The case of *Wells* v. *Middleton*(*a*) had no ingredient of fraud: but the deed was an instrument, which the policy

(*a*) Stated by the Lord Chancellor from a MS. note. See *ante*, vol. 12. p. 372. *Morse* v. *Royal*, and the note(*a*).

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of the law would not sustain, and it was necessary to set aside upon the relation of the parties; the effect of which is, that the Court has not sufficient evidence, that one party had given the otherthe benefit of all that knowledge, which, from the situation in which he stood, he ought to have supplied; the Court taking a different view of contracts between such parties and between strangers. The defendants in that case were the attornies, and relations, of the ancestor of the plaintiffs, who were the heirs at law. The question was, whether, notwithstanding all that advantage had been communicated, a deed of gift to an attorney could stand. The evidence was, that *Wilcox*, the ancestor, was of sufficient understanding to make the deed; that he made it knowing the contents; that it was deliberately read over to him; attested by respectable witnesses; and that he frequently afterwards recognized and admitted it. The defendants had not done any thing immoral or dishonest: but the principle of that decision was the policy of the law, founded upon the safety and convenience of mankind: a shield against advantage taken by persons in situations of confidence, preventing acts of bounty, which in other situations might have effect: but the deed being taken, while the character of attorney to the grantor remained, could not be permitted to stand without striking at the root of the principle.

Relief against a deed of gift by a ward just of age to his guardian.

The case of *Pierse* v. *Waring*,(*b*) is another authority in the particular instance of a guardian. There *would be no bounds to the crushing power of attornies and persons having confidential communication, when no other person is present. That case did not turn upon advantage taken in the particular instance, but upon the general rule, that the transaction should not take effect.

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As to the rules of evidence, an important consideration arises. It is incumbent upon the Court, entering into facts

(*b*) Cited 1 *Ves.* 380 2 *Ves.* 548. Stated from the register book. 1 *P Wms.* 118 Mr. Cox's note See *Hatch* v. *Hatch*, *ante*, vol. 9. p. 292

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Steward bound to account periodically; though not called on.

after a great lapse of time, to have an inquiry. This defendant admits, that, from the year 1780, he was in possession, as steward, of valuable estates, the owner living in *Ireland;* and not one account has been rendered, though called for. My opinion is, that it is not necessary to call for an account from a steward. His duty requires him to render accounts periodically; and, if from negligence or any other cause, he fails in that, he cannot make the obscurity, occasioned by that omission, a cover to him. It is therefore properly admitted, that the defendant must account. If, when called upon to account for such a length of time, he suffers any inconvenience from the destruction of vouchers, the fault is his own. If he had duly accounted, he would not have been exposed to that inconvenience; which, considerable as it may be, cannot be represented as the effect of any new principle, imposing the proof upon him.

As to the answer, I agree to what has been stated by the *Solicitor-General.* When the bill is for discovery only, and the answer is read for that purpose, you read the whole. But when relief is prayed, and the plaintiff replies to the answer, putting the whole in issue, he cannot, reading the answer as to the contract and the consideration, stop at the end of a sentence, but must proceed to the completion of the immediate *subject, to which the defendant is answering; as at law a witness cannot be stopped, where the party, wishing to elicit from him particular facts, finds it convenient to stop him; but must be allowed to finish the particular subject; and to proceed to state any thing with reference to it. Otherwise the party might obtain an advantage; stopping the evidence just at the qualification. But that does not apply to distinct matter. * 54

As to setting aside this lease, the case is not ripe for that: neither can the bill as to that be dismissed. Those parts of the answer, which the plaintiff is obliged to read,

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to make out the case, though not to be taken as true, are a sufficient ground for inquiry, with a view to throw some new light upon the subject. The defendant says, that, though it is true, *Lodge* took a lease, he applied not to him, but to Lord *W.*; who desired the steward to prepare a lease. It is singular, that the defendant should become an under lessee from *Lodge*; taking part of it; stating also a promise to him, not specifying, whether verbally, or in writing, that if he would lay out money, he should have a reversionary lease upon that lease for 500 acres, and at the same rent in substance; for the difference is nothing. The defendant goes farther; stating, that Lord *W.* so far from being ignorant upon the subject, went and looked at it in the presence of two persons, a clergyman and a farmer. The defendant cannot object to farther inquiry; particularly as the case must go to an inquiry, the effect of his own default and negligence; making an account from the year 1780 necessary.

The proposal of *Lodge* for a lease for 21 years refers to
* 55 several important particulars; offering security for *the rent; proposing an extensive plan of improvement, with judicious fencing, (which is very material, where there is wood,) on condition of an abatement of rent; holding out, that in 24 years the estate would be doubled in value. What is the duty of a steward to whom the landlord sends such a proposal? Is he not, having the execution committed to him, especially where he mixes himself in the transaction, bound to take care that covenants shall be inserted in the lease, to secure the benefits the landlord has a right to expect? The Court must look at that lease, if it is to be found: if not, the defendant must be examined upon interrogatories, as to the covenants contained in it; and whether the landlord had the benefit of them. Another subject of inquiry is, that the instant the lease was granted he became agent to *Lodge*. If the improvement was to be by *Lodge's* money, he must account for it: if by the skill of the defendant, that was the skill of an agent, due to his

principal for his benefit, not for the benefit of the agent himself, engaged in a joint concern with the tenant.

Therefore direct an inquiry as to the lease to *Lodge*, the rent reserved, and the covenants contained in it: what the lands let for, and the value of them, to be let when *Lodge* became tenant: whether any, and what improvements were made by *Lodge* or the defendant, in pursuance of such covenants, if any: the master to be at liberty to state any special circumstances to the Court.

## *SHELLY *against* ——. * 56

*August* 2. 5.

Upon a question of legitimacy, depending upon a chain of distinct circumstances, in the knowledge of different individuals, and the defendant, an infant, kept out of the way, an examination *de bene esse* would have been granted; tho' not within any of the three cases, viz. witnesses of the age of 70; or quitting the kingdom; or a fact depending on a single witness. But a proposal to have the infant brought into Court, and the six-clerk assigned as guardian to put in his answer, was adopted.

A MOTION was made by the plaintiff, that several witnesses should be examined *de bene esse* under the following circumstances, suggested by the bill, and supported by affidavit. The plaintiff claimed in the event of the death of a woman without issue; suggesting, that she has no issue; having left town without any appearance of pregnancy; or, if she had a child, that it was not legitimate: her husband, during the whole time while she was in *London*, having been in *Sussex*. The plaintiff proposed to examine the witnesses respectively to several distinct circumstances, establishing that fact: the affidavit representing the several circumstances, material to the plaintiff's case, as resting solely in the knowledge of those individuals respectively. An infant was made defendant, as claiming to be a legitimate child. An appearance was put in, but no answer, after two orders for time, and an attachment: and it was suggested that the defendant was conveyed out of the way.

The *Solicitor-General*, Mr. *Richards*, and Mr. *Whishaw* in support of the motion.

1806.

Shelley v.

Generally, there are but three cases, in which the examination *de bene esse* is granted: 1st. Where the witnesses are of such an age, that there is probability of death, before the cause can be heard; which age is settled to be 70 years: 2dly. Where they are shortly to quit the kingdom: 3dly. Where the fact depends upon the examination of a single witness. In the two last cases the examination *de bene esse* is permitted without regard to age." The cases of *Shirley* v. *Earl Ferrers*,(a) *Pearson v. *Ward*,(a) and Lord *Dursley* v. *Fitzhardinge Berkeley*,(b) are authorities for such a bill. The distinction of this case, which is much stronger than those, is, that this is an application to examine several persons to a long chain of distinct circumstances, which are necessary to make out the plaintiff's negative case; and which he undertakes to prove: important facts being sworn to lie in the knowledge of particular individuals; to which no other person is privy; and which may be very material to the plaintiff's case; and this infant defendant is kept out of the way: so that the plaintiff is not in a situation to hear his cause. The best course will be, that the place where the infant is, should be disclosed, that he might be brought into Court by the messenger; and that one of the six clerks may be assigned as a guardian to put in an answer for him.

(a) 3 P Wms 77 See ante, vol 6. p. 254

* 57

(a) 2 Dick 648

(b) Ante, vol. 6. p. 251

Mr. *Bell*, for the infant defendant, resisted the motion, observing, that the allegation is, that the defendant, an infant, born in 1789, is a supposititious, or at least an illegitimate, child; that the father was one of the witnesses to be produced; and the infant, therefore, completely unprotected, unless protected by the Court; and that by the advice of counsel no answer was put in.

The Lord Chancellor.

The best course will be that which has been proposed; for upon the reason and justice of the case I should have no doubt in granting this application; though this does not

1806.
Shelley
v.

come within any of the three cases: 1st. Witnesses of the age of 70 years: 2dly. Witnesses quitting the kingdom: 3dly. A fact depending upon a single *witness; and, as Lord *Thurlow* said,(a) I would make a precedent, if there is not one. The law of *England* has been more scrupulous upon the subject of legitimacy than any other; to the extent even of disturbing the rules of reason. Formerly access was presumed, if the parties were within the narrow seas, though there was no doubt of the contrary. Since that time(b) access or non-access must be proved like any other fact: but it must be proved by witnesses, who all together prove that; though each speaks only to some particular circumstance.

* 58

(a) *Pearson* v. *Ward*, 2 *Dick* 648.

Access or non-access may now be proved: the old rule to presume access within the narrow seas having given way.

The effect of this affidavit is, that these are necessary and material witnesses to prove circumstances of this kind. The death of one, by which one link in the chain would be lost, might have the same effect as the death of all. From the peculiarity of the case of access or non-access, legitimacy or illegitimacy, great indulgence is to be applied. I have frequently witnessed the misery occasioned by the death of witnesses.

(b) *Pendrell* v. *Pendrell*, 2 *Str.* 925.

August 5.

The infant defendant was produced in Court in custody of the messenger.

Mr. *Hart* moved that the senior six-clerk, not towards the cause, should be assigned as guardian, to put in his answer.

The order was made accordingly.

1806.

## *TAYLOR *against* POPHAM
## MONKE *against* TAYLOR.

*August 7.*

Attorney's lien for costs upon a fund of assets, appropriated, prevailed, though the appropriation was subject to a debt, in respect of which the testator, as surety, was creditor of the client to a greater amount.

A PETITION, presented by the solicitors of *Robert Paris Taylor*, deceased, stated various proceedings in these suits, originally instituted in the years 1777 and 1778, upon the affairs of *Peter Taylor*, deceased, the father of *Robert Paris Taylor*; in the course of which, by the exertions of the petitioners, as solicitors of *Robert Paris Taylor*, a considerable demand on his behalf was established against the estate of his father on account of various dealings between them, in the *German* war of 1757; and by an order, dated 1st of *August*, 1791, an appropriation was made out of the assets of *Peter Taylor* to answer various sums, reported due to *Robert Paris Taylor*; the amount of which was directed to be laid out in bank 3 *per cent.* annuities, and placed to the account of *Robert Paris Taylor*: but a claim having been made by the executors of Lord *Holland* of 28,185*l.* 9*s.* 5*d.* as due from *Robert Paris Taylor* to the estate of Lord *Holland*, for which they contended *Peter Taylor's* estate was liable, in respect of bonds given by him to the late Lord *Holland*, as surety for *Robert Paris Taylor*, under which bonds judgments had been recovered, it was declared by the order of 1791, that what should be so placed to the account of *Robert Paris Taylor* was to be considered as a security to answer the debt due to Lord *Holland* from the estate of *Peter Taylor*. That debt was ascertained by the Master's report at 16,612*l.* 19*s.* 3*d.*

The Master's report, dated the 1st of *April*, 1792, stated, that he had taxed the costs of all the parties, including those of *Robert Paris Taylor*. He died in 1792.

*60 *By another order, dated the 19th of *July*, 1799, it was ordered that the sum of 14,990*l.* 4*s.* 4*d.* bank 3 *per cent.* annuities, being the amount of the appropriations directed by the former order to the account of *Robert Paris Taylor*,

should be placed to the account of the real estate of *Peter Taylor*; and that the value thereof should be taken in part satisfaction of the debt due to the estate of Lord *Holland*. In *July*, 1801, the further sum of 245*l*. 12*s*. 9*d*. which had been since got in, was paid into the bank to the account of *Robert Paris Taylor*, and laid out in 385*l*. 6*s*. 3*d*. 3 *per cent*. annuities.

1806.

Taylor v. Popham.

The prayer of the petition was, that the sum of 385*l*. 6*s*. 3*d*. bank annuities may be sold; and that the proceeds, together with the sum of 34*l*. 13*s*. 6*d*. cash, in the same account, may be paid to the petitioners, in part satisfaction of the sum of 331*l*. 9*s*. 4*d*. the amount of their costs as taxed under the order of 1791; and that the residue of their costs may be raised and paid out of the 3 *per cent*. annuities, standing to the account of the real estate of *Peter Taylor*, or any other fund.

Mr. *Perceval* and Mr. *Hart*, in support of the petition, contended for the solicitor's lien for the costs; insisting that, except in the instance of a creditor of the solicitor, there is no case in which taxed costs are not directed to be paid to the solicitor.

Mr. *Richards*, for the executors of *Peter Taylor*, resisted the petition; insisting, that, under the circumstances, the whole fund, recovered by the estate of *Robert Paris Taylor* against the assets of his father, should go to reimburse those assets on account of Lord *Holland's* demand, without any deduction for the costs.

*The Lord CHANCELLOR. * 61

The subject of this petition is of great and general importance. The lien of an attorney for his costs, as between him and his client, cannot be disputed.(*a*) If an attorney employed to sue, recovers 500*l*. and is entitled to

(*a*) Mitchell v. Oldfield, 4 Term Rep. 123.

1806. Taylor v. Popham.

tax the costs, and the client, being a debtor to the defendant in that action to a greater amount than the sum recovered, did not plead a set-off, but afterwards brings an action, and recovers a greater sum, that would not deprive the defendant in that action of his right to costs in the other. The attorney undertakes the suit upon the personal credit of the client; which has a good effect in preventing vexatious suits; as the attorney, unless he sees a probability of success, will not encourage the client. But the result being that the client is entitled to costs, it is admitted, they are the costs not of the client, but of the attorney; the effect of his lien, of which he is not to be deprived, unless satisfied by other means. The answer to that is, that it is true, if *Robert Paris Taylor* was entitled to the costs, the attorney had a lien: but they were not the property of *Robert Paris Taylor;* as, though he had recovered a demand from the executors of his father, yet, by the claim of Lord *Holland's* estate before the Master against the assets of the father, as having been surety for the son, the balance as between them was turned the other way; the plaintiff in the action in which these petitioners were the attorneys, being suddenly converted into a debtor.

If such a rule is adopted in equity, it will be attended
* 62 with extreme hazard to attorneys. My opinion is, that in this case the attorney is entitled to his costs; *and the orders that have been made will bear that construction. They are the costs of the plaintiff in the first instance. Lord *Thurlow*, and Lord *Rosslyn*, could not know how the account stood with the attorney. The client might have advanced money to him. The lien of the attorney must depend upon the account between them, which the Court had not then investigated. The prayer of this petition must therefore be granted.

1806.

## EX PARTE CONWAY.

August 9.

Commission of bankrupt superseded with costs, for fraud and misconduct. The solicitor charged with costs; not as having taken the creditor's account of the amount of his debt, without sufficient inquiry, being pressed by an execution; but as having by a false description obtained the docket contrary to the general order of Lord Rosslyn, requiring in a country commission two barristers, &c. which order is upon application in a proper case dispensed with.

THE prayer of this petition in bankruptcy, was that a commission of bankrupt should be superseded, as having been obtained by fraud, and improperly executed; and that the costs should be paid by all the parties concerned. The facts appearing by the affidavits, were that the petitioning creditor's debt was under 100*l.*; that, the person against whom the commission issued, living at *Newport Pagnel*, the commission was executed by three solicitors; no barrister attending, and no order having been obtained to dispense with Lord *Rosslyn's* general order.(*a*) The object was to defeat the execution of a creditor, who indicted and convicted two of the parties for a conspiracy. The solicitor to the commission was charged by the petition as having been privy to the conspiracy and fraud, or at least as grossly negligent in taking out the commission without making proper inquiry as to particulars of the petitioning creditor's debt, and the facts necessary *to support the commission, the act of bankruptcy, &c.

The secretary of bankrupts stated in Court, that he was deceived upon the application for the docket, by the addition "Esq." to the names of the two solicitors; and should have refused it, if they had been properly described.

The Lord CHANCELLOR.

*63

As to the conduct of the solicitor, if there is any thing from which fraud may be properly inferred; I would make him pay the costs on that ground.(*a*) But I do not find it distinctly laid down, that if an attorney has not made all the inquiries that prudence might suggest, where there is sufficient time before he strikes a docket, he shall be liable to pay costs. Is an attorney applied to upon a mar-

(*a*) 12th *August*, 1800, *ante*, at the beginning of vol. 5.

(*a*) See *ante*, vol. 6. p. 1, &c.

1806.

Ex parte Conway

ket-day, by a man who states that he is a creditor for 100*l.* and that an execution is then in the house of his debtor, to permit all the goods to be sold under the execution? The objection would apply equally to an affidavit to hold to bail. Some conversation about the note for 100*l.* upon which the docket was struck, appears to have taken place, as if he had made some inquiry. Upon the whole therefore I would not make the solicitor pay costs upon that ground.

But upon the other ground he must pay costs; having taken out the commission contrary to Lord *Rosslyn's* order, not making an application to dispense with it, which in a proper case would be granted. I have made two or three such orders, since I have sat here.

* 64 *The order was that the commission be superseded, with costs, to be paid by all the parties concerned, the costs of the application and of the criminal prosecution to be paid by all except the solicitor.



## EX PARTE LEE.

*August* 11

Insurance by a subject of this country upon foreign property, does not cover a loss by capture in a war afterwards taking place between this country and that of the assured.

Proof in bankruptcy therefore under such a policy expunged

THIS petition presented by the assignees under a commission of bankrupt, prayed, that the proof of a debt should be expunged. The debt arose under a policy of insurance on behalf of *French* subjects, during the last peace, just before the commencement of the war, upon which policy a total loss was incurred by capture by a *British* ship, after hostilities had commenced.

The *Solicitor-General* and Mr. *Perceval*, in support of the petition, cited the case of *Brandon* v. *Curling*;(a) and observed, that the effect of the war was just the same as if the insurance had been originally upon a contraband adven-

(a) 4 *East*, 410

ture ; as therefore it was clear that the proof ought not to have been admitted, it must be expunged.

1806.
Ex parte Lee.

The petition was not opposed.

The Lord CHANCELLOR.

The law upon this point is now perfectly settled, and tands upon a very sound principle of policy ; *though 65
frequently producing great hardship upon individuals ; that a subject of this country, shall not enter into an assurance that will have the effect of protecting the property of persons, who are subjects of a country in hostility with this. The consequence of permitting such an assurance, would be that it would be a complete indemnity against capture, either by his Majesty's ships, or private ships authorised by letter of marque to make prizes ; and the loss would fall upon *British* subjects. This proof must therefore be expunged.(*a*)

## EX PARTE WAGSTAFF.

*August* 11.

Acceptance, not due till after the bankruptcy of the drawer is capable of set-off, within the clause of the act as to mutual credit.

THE petition stated, that the petitioners had various dealings in trade with *James* and *William Kershaw:* the petitioners being in the habit of purchasing goods from the *Kershaws*, receiving remittances for their use, and accepting bills drawn on the petitioners; by means of which several dealings, mutual accounts subsisted between them. On the 29th of *June*, 1804, a commission of bankruptcy issued against *James* and *William Kershaw*. At that time the petitioners were in advance for money paid by them for the use of the bankrupts, exceeding the amount of their remittances, received and applied to their credit, with in-

(*a*) The right of a foreigner by contract generally, is only suspended by a subsequent war, and may be enforced upon the restoration of peace *Ex parte Boussmaker*, *post*. 71

1806.

Ex parte Wagstaff.

terest, the sum of 2,277*l.* 17*s.* 6*d.* The petitioners were also at that time under acceptance of a bill of exchange, drawn on them by the bankrupts, but not due at the date of *the commission, to the amount of 399*l.* 6*s.*; which
* 66 bill became due, and was paid by the petitioners on the 5th of *July*, 1804. The petitioners were at the time of the bankruptcy indebted to the bankrupts for goods sold, the sum of 360*l.*; the stipulated credit for which had not then expired; the goods having been purchased on credit, to expire on the 1st of *May*, 1805. The petitioners were also indebted to the bankrupts on a prior account for money had and received to their use, the sum of 3*l.* 13*s.* 3*d.*

The petitioners applied to prove under the commission, the sum of 2,277*l.* 17*s.* 6*d.*: but the commissioners refused to admit the proof; the assignees contending, that the two sums of 360*l.* and 3*l.* 13*s.* 3*d.* ought to be deducted; and that the amount of the bill, not being due or paid till after the bankruptcy, could not be debited in account against the bankrupts; but was a debt accruing after the bankruptcy, and not barred by the certificate. The petition was therefore presented; insisting, that the amount of that bill, though not due till after the bankruptcy, was an item of credit to the bankrupts in the mutual account between them and the petitioners; and that the petitioners had a right to apply in account, in the nature of set-off, what was due from them to the bankrupts for goods and otherwise to their protection, against and towards the extinguishment of their acceptance, and to prove the sum of 2,277*l.* 17*s.* 6*d.*; and praying accordingly.

The *Solicitor-General*, in support of the petition, insisted, that this was clearly a case of mutual credit: giving a right to arrange and set off the demands within the sta-
* 67 tute;(*a*) and according to the cases, **Smith* v. *Hodson*,(*a*) *Atkinson* v. *Elliot*,(*b*) *Ex parte Boyle*;(*c*) the distinction

(*a*) Stat. 5 *Geo.* II. c. 30 s. 28. (*a*) 4 *Term Rep.* 211. (*b*) 7 *Term Rep.* 378. (*c*) 1 *Cooke's* Bank. Law. 561.

1806. Ex parte Wagstaff.

of this case being in favour of the right to set off: the whole of the debt due from the petitioners at the date of the bankruptcy, not being actually payable at that time.

Mr. *Cullen* for the assignees, endeavoured to distinguish the cases cited.

The LORD CHANCELLOR.

The bankrupt, being a creditor of the petitioners, drew a bill upon them before the bankruptcy; which bill they accept. Is not that a mutual account-mutual credit to all intents and purposes?

The order directed the proof to be admitted.

## EX PARTE HEYWOOD.

* 68

*August* 15.

Commission of bankrupt superseded with costs: the bond to be assigned; and the proceedings to be impounded. The solicitor not charged with the costs; unless guilty of such an abuse as amounts to a contempt; in which case he might even be struck off the roll: but the charges being denied, the creditor must bring an action against him.

UPON the petition of a bankrupt the commission was ordered to be superseded with costs, on the grounds of fraud and oppression; and that there was no petitioning creditor's debt. A question then arose as to the costs, whether they should fall upon the *petitioning creditor alone; or whether the solicitor should also be charged.

The Lord CHANCELLOR refused to charge the solicitor with the costs, as he had by affidavit denied the charges against him; unless it should appear that the petitioning creditor was insolvent; admitting that the bankrupt, having succeeded in superseding his commission, must be completely indemnified.

Mr. *Perceval* and Mr. *Hart*, for the petitioning creditor, referred to the general observations that had fallen from Lord *Eldon* upon the subject of misconduct by solicitors,

1806.

Ex parte Heywood.

(a) See ante, vol. 6. p. 1. &c.

taking out commissions of bankruptcy;(a) insisting, that the jurisdiction to fix the solicitor guilty of gross misconduct with the costs, was never questioned; and could not be relaxed without the utmost danger; that a more strict obligation was imposed upon a solicitor in bankruptcy than in any other business. It is his duty to see all the particulars: especially the debt to his client, the trading, and the act of bankruptcy. The Lord *Chancellor* trusts to the solicitor, and requires from him a superior degree of diligence upon this subject. In this instance there is more than gross negligence. The attorney was guilty of gross misconduct. Even upon his own affidavit, it appears that he knew there was no petitioning creditor's debt; that afterwards his client was desirous of not proceeding farther; and countermanded his authority: yet the attorney, exercising his own judgment, persevered. In these cases three gradations of punishing the attorney, if he does not exculpate himself by evidence, have been adopted: 1st. Implicating the attorney in the charge of costs: 2dly. An
* 69 order that *he shall not take out any more commissions: 3dly. Striking him off the roll.

The *Attorney-General*, Mr. *Hall*, and Mr. *Heald*, for the solicitor, were stopped.

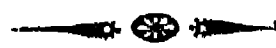
The Lord CHANCELLOR.

I feel, as much as any Judge can feel, the necessity of correcting the frauds that are particularly manifest in proceedings under commissions of bankruptcy; and am not by any means disposed to differ from the observations made by Lord *Eldon* upon this subject; and have the same determination to follow up these abuses. But in this jurisdiction the ministers of it must be visited upon the same principle as a Judge in any other Court would visit the ministers of that Court. There can be no doubt if an attorney is guilty of misconduct, and abuse of the process, he shall pay the costs. I made such an order a few days

ago,(a) where the attorney had obtained the docket in opposition to Lord *Rosslyn's* order by a false description. Farther, if abuse appears, though the party might be satisfied, and not ask any proceedings against the attorney, I would, as at law, direct him to answer the matters of an affidavit; and, if he did not answer satisfactorily, would, according to the circumstances, even strike him off the roll; and if it should appear that he had done wrong to the party, that the costs had fallen upon the party by his negligence, or injustice admitted by him, so that a trial would not be necessary; above all, if charges of malpractice remained unanswered, I would bind him to make satisfaction. But it must be such a case: for an attorney is entitled to the same investigation as any other man; and the charge against him, if denied, cannot *be decided by affidavit. If the effect is a mere private wrong to the client, not such an abuse as amounts to a contempt, the client must bring an action. * 70

(a) *Ex parte Conway, ante*, 62.

The order directed the commission to be superseded, with costs, to be paid by the petitioning creditor; the bond to be assigned, and the proceedings to be left with the secretary of bankrupts.



## EX PARTE BIELBY.

*August* 14, 22.

Creditors, having proved under a joint commission of bankrupt upon a joint and several obligation, but not having received a dividend, permitted to waive their proof, and to prove against the separate estate; not disturbing any dividend already made

UPON this petition it appeared, that the petitioners had proved under a joint commission of bankruptcy, upon a promissory note, by the bankrupts jointly and severally, to pay 400*l.* The petitioners, not having received any dividend, presented the petition to waive their proof, and to be at liberty to prove against the separate estates of the bankrupts, and to receive dividends.

1806. Mr. *Daniel*, in support of the petition.

Ex parte Bielby.

The Lord CHANCELLOR said he would not allow any dividend of the separate estate, already made, to be disturbed; and, with that reserve, made the order according to the prayer of the petition.

* 71

# *EX PARTE BOUSSMAKER.

*August* 14.22.

The right of a foreigner by contract, generally, is only suspended by a subsequent war, and may be enforced upon the restoration of peace.

In bankruptcy therefore a claim admitted; reserving the dividend.

THE object of this petition was to be admitted to prove a debt under a commission of bankruptcy; which the commissioners refused to admit, upon the objection, that the creditors applying to prove were alien enemies.

Mr. *Perceval*, in support of the petition.

This proof ought to be admitted at least. It will be another consideration, whether the petitioners shall receive dividends. But clearly the other creditors ought not to be permitted to take the dividends accruing upon this debt, for the crown will be entitled. There is no law now subsisting, that a debtor to an alien enemy shall not pay the debt; the act of parliament to prevent that in the last war having expired, and not being renewed. Upon the common law undoubtedly the objection might be made by the debtor by plea. The demand would survive at the end of the war; the suit only being suspended. The effect of that suspension will be obtained, admitting the proof, either by not permitting them to take a dividend, or by having it paid into Court. Here is no allegation, that these persons were alien enemies at the date of the contract.

The Lord CHANCELLOR.

Contract with an alien enemy void.

If this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract

1806.

Ex parte Boussmaker.

would be void. But, if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but, the contract being originally good, upon the return of *peace the right would survive. It would be contrary to justice therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment from the analogy to the case of an action; and it is true a Court of Law would not take notice of the objection without a plea. It must appear upon the record. Has the case of a contract originally good, and the right suspended by war, never before occurred? Yet I do not know an instance of an application by an alien enemy to the Court to keep the fund until his right to sue should survive. The policy, avoiding contracts with an enemy, is sound and wise: but where the contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost, is very different. * 72

At law the objection of alien enemy must be pleaded.

Let a claim be entered, and the dividend be reserved.(a)

(a) See the distinction upon the case of an insurance of foreign property in this country, followed by a war with the country of the assured: a loss, incurred by the hostile act of this country, cannot be recovered even upon the return of peace. *Ex parte Lee, ante*, p 64. *Brandon* v. *Curling*, 4 *East*, 410.

END OF THE SITTINGS AFTER TRINITY TERM.

*THE SITTINGS BEFORE MICHAELMAS TERM,
47 GEO. III. 1806.

## HALSEY *against* GRANT.

*November* 2, 3.

Specific performance upon the principle of compensation and indemnity: not, if the effect is a substantial deviation from the contract.

THE bill prayed the specific performance of an agreement by the defendant to purchase various premises from the plaintiff; which agreement was the clear result of letters that passed between them. The usual reference to the Master was directed, to inquire whether the plaintiff could make a good title.

The objections relied on before the Master were, 1st. That the tithes, contracted to be purchased by the defendant, forming part of the rectory of *Woking*, would be subject to a certain perpetual annual rent of 19*l.* 6*s.* and to some other small annual payments, and the repairs of the chancel of the parish church of *Woking*; which are issuing out of, and charged upon the said rectory.

2d. The plaintiff being lord of the manor, and the defendant a copyhold tenant, and part of the contract being that the copyhold of the defendant, should be enfranchised from all heriots, fines, &c. that the defendant's copyhold property, parcel of the manor of the said rectory of *Woking* by being enfranchised by the plaintiff, in the manner con-
* 74 tracted *for by the defendant, would also become liable to the said rent, and other payments and repairs.

Upon the first point, the Master's report stated, that as it appeared from the affidavit of the plaintiff, that the rectory and rectorial property of *Woking*, exclusive of the

tithes, fines, heriots, and other property of the like description, consisted of a parsonage house, with the appurtenances, and about 79 acres of land; all which, as constituting part of the rectory, had, as far back as any evidence of title appeared, been conveyed and dealt with, as being parcel of, and belonging to the rectory, and the parsonage house and lands, &c. were of the annual value of 100*l.* and upwards, and if the common and wood were inclosed, would be worth considerably more; the Master was of opinion that the objection to the tithes being subject to the rent and other outgoings and repairs, could not be supported; and as to the second objection the Master was of opinion that the copyholds might be so enfranchised, as not to be subject to the demand of such reserved rent, and other outgoings and repairs. The Master therefore reported that a good title could be made.

1806.

Halsey v. Grant.

To this report exceptions were taken by the defendant, insisting that by the grant of the rectory and tithes, and some subsequent conveyances, under which the plaintiff claims, the same are subject to a perpetual rent-charge of 19*l.* 6*s.* and some other small annual payments, and also the repairs of the chancel of the parish church of *Woking*; and therefore the plaintiff cannot make a good title to the said tithes, and convey the same discharged from the said rent-charge and other incumbrances; and for the same reason the plaintiff cannot enfranchise the defendant's copyhold, *situated within the manor, discharged from the said incumbrances. * 75

Mr. *Perceval* and Mr. *Richards*, in support of the exceptions.

The *Solicitor-General*, Mr. *Fonblanque*, and Mr. *Hall*, for the plaintiff.

Upon the authority of *Horniblow* v. *Shirley*,(a) this is a case for compensation. When that cause came on for

(a) The next case.

1806

Halsey v. Grant.

farther directions, it was argued that as it appeared by the report, that there was a rent-charge, upon which the objection was raised, the defendant was not obliged to take the title. But he was compelled to take it; and Lord *Alvanley* said if such an objection was to prevail, a purchaser of a portion of a large estate would always be at liberty to get rid of a contract. An indemnity was given in that case, and is offered in this. The objection, supposing Lord *Onslow*, to whom this rent is payable, would go upon those tithes when such an estate is liable to his distress, is obviously frivolous and captious. But it is clear these tithes never could be subject to this rent-charge. That is admitted, unless it had been sold under the statute;(*b*) and it is not alleged that this was a rent, sold under that act, or even existing in the crown at that time. From the nature of this property, a manor, the purchaser must know that it is subject to some rent reserved to the crown. Tithes, part of a rectorial manor, and manorial rights, must be purchased, subject to their incidents.

(*b*) Stat. 22 *Car.* II c. 6

* 76

*The Lord CHANCELLOR.

*November* 3.

This case involves a principle of general importance. The authorities upon this subject are not so satisfactory as I could wish. I am therefore desirous of expressing my opinion with distinctness, that the principle may be understood.

If a Court of Equity can compel a party to perform a contract, that is substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that for which he stipulated, without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely un-

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certain. There is no doubt that this jurisdiction had its origin upon the foundation of a legal right, the law giving the title; but a Court of Law, from the modes in which justice is there administered, not being capable of giving a complete remedy; all the relief to which the party was entitled. This jurisdiction began so long ago as the time of King *Henry* the 7th; and, though Courts of Equity then proceeded upon that principle, yet the Courts of Law thought proper to resist the jurisdiction. *Bromage* v. *Genning*,(a) in the 14th year of King *James* I. was the plainest case that can be stated; and the ground taken against the jurisdiction, the most untenable, preposterous, and unjust. This most beneficial jurisdiction was in that instance maintained in equity.

Origin and progress of the equitable jurisdiction to enforce the specific performance of agreements

(a) 1 *Roll' Rep* 368.

*When the Courts of Equity had quieted these doubts, and maintained their jurisdiction, they could not confine it to cases of strict legal title; for another principle, equally beneficial, is equally well known and established; that equity does not permit the forms of law to be made instruments of injustice; and will interpose against parties, attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where, therefore, advantage is taken of a circumstance that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of 99 years in a farm, and it appears that the vendor has only 98 or 97 years, he must be nonsuited in an action: but equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation, now so well established; a principle which I have no disposition to shake. * 77

In *Seton* v. *Slade*(a) Lord *Eldon* takes notice of that, as being the foundation of this jurisdiction. So upon the same contract, for the lease of a farm, with immediate

(a) *Ante*, vol. 7. p. 265. See p. 274.

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possession; and six months of the old lease are unexpired; the lessee may not want it immediately. He may not look to an immediate entry. In that instance also, equity will, upon the same principle of compensation interfere. This is the perfection of our jurisdiction. If the rigid construction of the law were relaxed, there would be no safety; but the system is rendered perfect by this healing power of equity; preserving the substantial part of the contract, but
78 not forcing *upon the party something different; and the effect is substantial justice.

Upon the several authorities, which are all referred to in the case of *Drewe* v. *Hanson*,(a) my opinion concurs exactly with that of Lord *Eldon* and the Master of the Rolls. I collect from the manner in which the judgment in that case is expressed, that Lord *Eldon* did not feel disposed to sanction some cases that go to an extent, to which I never will follow. Lord *Eldon* states his opinion upon the cases of the house and the wharf, and *Shirley* v. *Davis*, in the strongest way, in which, expressing strong disapprobation with due respect to the decision of another Court, it could be stated. In such a case, a Court of Equity has no jurisdiction upon the principle of compensation; and I distinctly say, much as I reverence the Judges, of whose opinions I am speaking, I never will exercise such a jurisdiction.

(a) *Ante*, vol. 6. p 675

In the case of *Fordyce* v. *Ford*(b) this sound distinction was taken by Lord *Alvanley;* that if the objection that the estate contracted for as freehold was leasehold, except seven acres only, had been made, the contract ought not to have been carried into execution. The same point was decided by the Master of the Rolls in *Drewe* v. *Corp.*(c) That was the case of a term of 4,000 years, foreclosed: in point of title just as good as a freehold. The Master of the Rolls states, that where the party gets substantially, that for which he contracts, any small difference may be remedied by compensation: but not where it extends to the

(b) 4 *Bro C. C.* 494.

(c) *Ante*, vol 9. p 368

whole estate. The principle, as there stated by the Master of *the Rolls, and by Lord *Eldon* towards the conclusion of *Drewe* v. *Hanson*,(a) is sound, clear, and most beneficial; that where one party would be foiled at law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted: not where the effect will be to put upon him something constitutionally different from that, for which he contracted. * 79

The case of indemnity against a supposed defect of title, differs in some respects from compensation. There is some difference between this case and *Horniblow* v. *Shirley*:(b) for the defendant in that case did not by his answer insist that he had a right to be discharged from the contract; though it was argued upon that ground. The parties also appointed judges of their own choice; for the authority of the arbitrators was not by the act of Parliament; which the parties agreed to obtain for the sanction of their proceedings. The answer insisted, that there should be no specific performance, unless the plaintiff would make a considerable abatement in the purchase-money; not resisting the execution *in toto;* but desiring an abatement, both in respect of the outgoings, and the mistake in the valuation. The defendant therefore did not stand upon such an objection as that an estate, represented as tithe-free, was subject to tithes. Lord *Alvanley*, then Master of the Rolls, directed a reference to the Master, to inquire as to the incumbrances and outgoings, to set a value on them, and to ascertain an indemnity. The indemnity proposed, was a charge upon the land, allotted to the plaintiff as a compensation for his tithes: *a complete indemnity, going with the land through all alienations; and a value was set upon the incumbrances; to be deducted as an abatement from the price; which was what the de- * 80

(b) The next case.

(a) *Ante*, vol. 6. p. 675. That case did not come before the Court again; having been settled upon the decision on the motion for the injunction.

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fendant desired by his answer. That case therefore cannot be considered an authority altogether compulsory.

Upon the case now before the Court there can be no ultimate difficulty. This objection may be something visionary. It does not appear upon the Master's report, what is the nature of the incumbrance. It consists of an annual rent of 19*l.* 6*s.* payable to Lord *Onslow*, and some other small charges: but the report states, that the rectory amounts to 100*l.* *per annum*, in tangible property, far beyond the amount of the charge within reach, with a clear remedy by distress. It is not likely therefore, that these tithes will be resorted to. Lord *Onslow's* title must be known to the plaintiff paying this rent; who therefore cannot have any difficulty in quieting this objection, and putting an end to the incumbrance. The object of the statute(*a*) was to enable the crown to sell fee-farm rents, and other rents; and with a view to encourage purchasers, they were to have remedies, which they had not before. There is no evidence that Lord *Onslow* was a purchaser falling within that act; and if not, he cannot have a distress. There is no remedy for rent except distress, or an action of debt or covenant; and here is no privity to support that. Some farther inquiry is necessary as to the nature of this rent. If it gives a right of distress, an indemnity will be necessary. There may be difficulty in releasing a rent-charge. I see in Mr. *Cruise's* Work,(*b*) *this has been the subject of much consideration; and if the person entitled to the rent-charge, joins in a conveyance, which does not operate as a release, an injunction would be granted. The plaintiff therefore can relieve the purchaser from all uneasiness upon this head, and, if he can, he ought to do so.

The exceptions were overruled, and a specific performance was decreed; with a reference to the master to

(*a*) Stat. 22 *Car.* 2, c. 6.

(*b*) See Mr. *Cruise's* Digest of the law of Real Property Tit 28 vol 3 p 355. s 20

* 81

inquire whether there ought to be any, and what indemnity.(a)

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(a) Horniblow v. Shirley, the next case; Dyer v. Hargrave, ante, vol. 10 p 505

## HORNIBLOW *against* SHIRLEY.

ROLLS.
1802
*March* 23

Specific performance upon the principle of compensation and indemnity: the effect not being a substantial deviation from the contract.

BY articles of agreement, dated the 28th of *April*, 1794, reciting an intended inclosure of common in the hamlets of *Over Eatington* and *Fulready*, that the defendant was Lord of the Manors, and that the plaintiff was entitled to all the tithes of corn and grain in *Eatington* and *Fulready*, it was agreed, that the common fields should be divided and allotted by three commissioners, to be elected, as therein mentioned, to and amongst the several owners and proprietors; and that the said allotments should be inclosed under the direction of the commissioners; and that so much should be allotted for the plaintiff as in the judgment of the said commissioners should be a full compensation for and in lieu of all the tithe of corn and grain within the hamlet of *Fulready*; and that one of the said commissioners should be named by the plaintiff, one by the defendant, *and one by all the owners of the common fields, or the major part in value; and that all parties should concur in procuring an act of parliament for dividing, &c. the said common fields, upon the terms before mentioned. 82

It was farther agreed, that all the tithes of corn and grain within the township of *Lower Eatington* and hamlet of *Fulready*, belonging to the plaintiff, should be valued by two persons, one to be elected by the plaintiff, the other by the defendant; and that the defendant, and his heirs, executors, &c. should pay to the plaintiff, his heirs, executors, &c. such sum of money as the said tithes should by such valuation amount to for purchase of the said tithes of

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*Lower Eatington* and *Fulready*; and the plaintiff should on payment thereof convey to the use of the defendant and his heirs, all the said tithes of corn and grain arising within the said township of *Lower Eatington* and *Fulready*, and the fee-simple and inheritance thereof respectively, and all the plaintiff's right and interest therein and thereunto free from all incumbrances whatsoever.

According to this agreement an inclosing act was obtained, the tithes valued at 2,566*l.* 10*s.* and 55 acres were allotted in lieu of the plaintiff's tithes in *Fulready*. The bill prayed a specific performance of the agreement for the purchase of the tithes.

The defendant by his answer raised two objections: 1st. That the tithes are not free from incumbrances, but are, with other parts of the rectory of *Eatington*, subject to payments and outgoings, from which they cannot be exonerated, and which were suppressed from the referees, and not
* 83 taken into consideration: 2dly. That *the referees much exceeded the value of the tithes, from a mistake as to the quantity of the land. The defendant therefore insisted that the plaintiff is not entitled to a specific performance of the agreement, unless he will make a considerable abatement in the purchase-money, both in respect of the said outgoings, and also from the mistake under which the referees made the valuation.

By a decree, pronounced at the Rolls on the 3d of *May*, 1798, it was referred to the Master to inquire, whether the plaintiff can make a good title to the estate contracted for: and, in case the Master shall find that there are any incumbrances or outgoings affecting or issuing out of the said estate, it was ordered, that the Master shall state what such incumbrances or outgoings are, and set a value thereon; or ascertain what may be a proper indemnity against the same.

The Master's report stated, that the plaintiff can make a good title, and that the tithes in *Lower Eatington* and *Fulready*, part of the estate contracted for, are charged with the payment of an annual fee-farm rent for the whole of the rectory, of 6*l.* 3*s.* 4*d.*; also with the annual payment of 5*l.* for the whole rectory, for the benefit of the poor of *Upper Eatington*, and other places; making together 11*l.* 3*s.* 4*d.*; that the said tithes are also chargeable with the repairs of the chancel of the church of *Eatington*; but by a late act of parliament the defendant is bound to build a new church, in consequence of which the plaintiff alleges that the chancel cannot want any repair for many years to come: that it appears by the deeds that there are other charges and incumbrances affecting the tithes; viz. a yearly pension of 3*l.* 6*s.* 8*d.* and another of 10*s.* payable out of the whole rectory; both *which the plaintiff alleged have not been paid within 80 years, if ever. 84

The report farther stated, that as to the charge of 11*l.* 3*s.* 4*d.* a year, actually paid, the plaintiff proposes to allow 29 years purchase, being the same number of years purchase to be paid by the defendant to the plaintiff for the tithes, amounting to 323*l.* 16*s.* 8*d.*; which sum the Master set as the value of the said incumbrances; and it was proposed, that, in case the defendant refuses to accept the said allowance, the plaintiff will indemnify the defendant against the same by a charge on the lands, allotted to the plaintiff in lieu of the tithes of *Upper Eatington*, or a competent part thereof; containing in the whole 184*a.* 1*r.* 36*p.* the whole let at an annual rent of 22*s.* 6*d.* per acre, amounting to an annual rent of 207*l.* 11*s.*; and the plaintiff proposes in like manner, out of the said lands, or a competent part thereof, to indemnify the defendant against the said annual charges of 3*l.* 16*s.* 8*d.* and the repairs of the chancel.' The Master stated that he approved the proposal.

On the 23d of *March*, 1802, the cause was heard at the Rolls for farther directions, when a specific performance

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was decreed, and the Master was directed to compute interest upon the purchase money, and also on the sum of 320*l.* 16*s.* 8*d.* allowed by the plaintiff for the charges of 11*l.* 3*s.* 4*d.* a year; and it was ordered, that, on payment by the defendant of the balance, the plaintiff should execute a conveyance.(*a*)

(*a*) *Halsey* v. *Grant*, the preceding case. *Dyer* v. *Hargrave*, *ante*, vol. 10 p. 505.



* 85

Nov. 3, 4

## *BOYD *against* MILLS.

The effect of taking exceptions, pending a demurrer to discovery, is to admit the demurrer.

Plaintiff permitted to withdraw the exceptions, paying the costs, without prejudice.

A MOTION was made by the defendant, that a demurrer should be struck out of the paper; having been set down by the plaintiff, after exceptions taken to the answer; and that the plaintiff may be ordered to pay the costs of the application.

Mr. *Owen*, in support of the motion, contended, that the effect of taking exceptions is, that the demurrer to discovery is good: and therefore the demurrer was set down irregularly.

The *Solicitor-General*, for the plaintiff, offered to withdraw the exceptions and pay the costs, without prejudice to filing exceptions if the demurrer should be allowed; but insisted that the consequence of taking exceptions is not that the demurrer shall stand allowed. Lord *Redesdale* certainly states that to be the consequence;(*a*) but cites no authority. The case of *The London Assurance* v. *The East-India Company*,(*b*) does not apply to this point; determining only that exceptions cannot be taken, until the demurrer is disposed of: Lord *Redesdale's* proposition supposing the exception to be regular. The other books of practice do not support that proposition. Such a rule would be hard upon the plaintiff; as regularly the defend-

(*a*) *Mit* 252

(*b*) 3 *P. Wms* 326.

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ant should himself set down the demurrer. He is bound to enter it with the register within a certain time. If he neglects to do that, the plaintiff may set it down.

*Mr. *Owen*, in reply to the proposal to waive the exceptions without prejudice, referred to *Dolder* v. *The Bank of England*;(a) to shew the strictness as to permitting any amendment of exceptions, unless a case of clear mistake, and that must be rectified upon the record. * 86

(a) *Ante*, vol. 10. p. 284.

The Lord CHANCELLOR. *November 4.*

The case of *The London Assurance* v. *The East-India Company*,(b) is not inconsistent with Lord *Redesdale's* proposition; which appears to me to be supported also by the reason of the thing. The rule established in that case, that the plaintiff cannot except pending the demurrer, might have reference to the understood practice of the Court, that he could not except without admitting the validity of the demurrer; the foundation of which seems to be, that dealing with the answer as if it was proper, except as to the particular subject of exception, is an implied admission of the validity of the demurrer.

(b) 3 *P. Wms.* 325.

But in this case the plaintiff is entitled, according to the offer he has made, to withdraw the exceptions, paying the costs, and if the demurrer shall be allowed upon argument, he may again except, and put in the same exceptions. The principle is clear upon *Dolder* v. *The Bank of England*:(c) the exceptions having been taken upon a mistake as to the practice, without any intention of waiving the demurrer. The mode in which the error is to be corrected, should be in the *discretion of the Court. Amendment may be permitted, if it can be done without disfiguring the record; but if the amendments must be so considerable as to blot and deface the record, as in that instance, exceptions taken from one bill instead of another, the re- * 87

(c) *Ante*, vol. 10. p. 284.

Where amendment is permitted, if so considerable as to deface the record, it must be taken off the file, and a new record substituted.

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cord should be taken off the file; and a new record put upon it.

The motion was therefore refused; the *Solicitor-General* undertaking to withdraw the exceptions and pay the costs.

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## WHITE *against* WILSON.

*August* 5.
*Nov.* 12.

Heir at law, defendant, desiring an issue upon a will, in which he failed, entitled to his costs in equity. No costs on either side as to the issue; ordered to pay costs of a groundless motion for a new trial.

THE bill in this cause was filed by devisees under the will of Lord *Chedworth*, dated in 1804, to have the will established, and the trusts carried into execution. An issue, *devisavit vel non*, was desired by the heirs at law, suggesting incompetency in the testator. Upon the trial of that issue in the Court of King's Bench, a verdict was found establishing the will upon very clear and strong evidence of capacity, as to the conduct of the testator, particularly as a magistrate, acting as chairman at the quarter session; and in the House of Lords; opposed only by some circumstances of eccentricity and singularity in dress, which came out principally upon the cross-examination, the heir examining only one witness. A motion was made by the heir for a new trial upon a suggestion of the expectation of farther evidence, and an affidavit by Dr. *Parr*, expressing his opinion that the testator had not been of a
88 perfectly sound mind, *from a propensity to insanity, perhaps subsisting from his birth, and promoted by certain circumstances of his life. On the other side several letters from Dr. *Parr* to the testator were produced, consulting his Lordship upon subjects of literature, expressing in strong terms an opinion of his good sense and talents; and in one instance recommending a clergyman for a living in his Lordship's gift; the offer of which Dr. *Parr* declined for himself.

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Mr. *Perceval*, Mr. *Richards*, and Mr. *Leach*, in support of the motion for a new trial, observed, that if the directions should be given upon this verdict, the effect would be a perpetual injunction after a single trial, though farther evidence was expected, and the right could never be bound by a single ejectment.

The *Attorney-General*, *the Solicitor-General*, Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Wishaw*, opposed the motion.

The Lord CHANCELLOR.

Insanity having been once established, proof of recovery is upon the party: otherwise the insanity must be established, by proof applying to the particular date.

I should be very sorry to find a rule in this Court, that there must be a second trial of an issue, if desired, without any ground laid for it. The rule upon this subject of lunacy has never been so distinctly stated as by Lord *Thurlow* in the case of *The Attorney-General* v. *Paruther*,(a) viz. where the party has ever been subject to a commission or to any restraint, permitted by law, even a domestic restraint clearly and plainly imposed upon him in consequence of undisputed insanity, the proof shewing sanity is thrown upon him: on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the *proof of insanity, which does not appear to have ever existed, is thrown upon the other side, which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction. A deviation from that rule will produce great uncertainty.

(a) 3 *Bro. C. C.* 441.

* 89

In such a case as this, therefore, it must be shewn that a man, exercising all these great public duties, which it was proved this testator did exercise, had nevertheless a morbid image in his mind, upon a particular subject, so wide from sound understanding and clear reason, the distinction of a sound mind, that he ought not to be considered as in that state. In my experience I know only one instance of

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a verdict of lunacy under such circumstances; which is the case of Mr. *Greenwood*,(a) who was bred to the bar, and, as Lord *Chedworth* did, acted as chairman at the quarter sessions; but, becoming diseased, and receiving in a fever a draught from the hand of his brother, the delirium taking its ground then, connected itself with that idea, and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects, but that morbid image never departed; and that idea appeared connected with the will, by which he disinherited his brother. Nevertheless it was considered so necessary to have some precise rule, that, though a verdict had been obtained in the Court of Common Pleas against the will, the Judge strongly advised the Jury to find the other way; and they did accordingly find in favour of the will. Farther proceedings took place afterwards, and concluded in a compromise.

(a) Cited 3 *Bro. C. C.* 444. *Attorney-General* v. *Parnther*.

* 90 *But is this a case of that sort? Is there any evidence of a morbid image in the mind of this testator, connected with this will, or at any other period? On the contrary, all the evidence, witnesses of the highest character contradict that. Dr. *Parr* does not represent that he was near the testator about the time he made his will, but carries him back to the time he was at school at *Harrow*. The inclination of Courts of Justice is against permitting parties to beat up for evidence; especially in a case of fact, mixed with opinion. No affidavit is produced giving any reason to expect farther evidence, capable of shaking this verdict.

*November* 12. The application for a new trial having been refused, the cause came on for directions upon the equity reserved, when it was pressed, that the heirs at law should pay the costs.

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Mr. *Perceval*, Mr. *Richards*, Mr. *Leach*, and Mr. *Wetherell*, for the heirs at law, insisted, that they ought to have costs; and if not, it was very difficult to state any ground upon which they should pay costs. *Webb* v. *Claverden*(a) was cited; and *Berney* v. *Eyre*;(b) in which case Lord *Hardwicke* states that it must be a very strong case that will induce the Court to give costs against him; as spoliation, or secreting the will.

(a) 2 *Atk.* 424.
(b) 3 *Atk.* 387.

The *Attorney-General*, in reply.

The heir must be brought before the Court, that the will may be established. In *Berney* v. *Eyre* it is laid down, that even upon a bill *in perpetuam rei memoriam* he *may cross-examine; and always has his costs of course down to that period. If he examines witnesses upon his part, the costs of that are refused to him. If he desires a trial at law, the ground must be considered. In that case also it is laid down, that, if the heir sets up insanity, and fails, he shall not have his costs. * 91

In this instance the heirs set up insanity, and have failed. The costs at law, it is agreed, are in the discretion of the Court. The question is, whether they had any probable ground for disputing the capacity of the testator to make a will. In such a case, if the heirs are not compelled to pay costs, it will establish a rule, that in no future case, however remote or indifferent the heir may be, however wantonly he may set up the pretence of insanity, except in the case of personal misconduct, shall he pay the costs, to which he may in that way put the party.

The Lord CHANCELLOR.

The practice is well established, that, where a bill is filed against an heir at law, praying relief, as in this instance, to have the trusts of the will carried into execution, if he, who

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has a great interest in the inheritance, and is favoured by the law, cross-examines, he is entitled to his costs; being brought into equity, in order that the will may be established against him; and having a right to see whether he is disinherited or not. If he chooses to examine witnesses himself, the question of costs will depend upon the circumstances. But he is indulged in going a step farther. On account of the frail and imperfect mode of examining into facts in this Court, he has a right *ex debito justitiæ* to demand an issue; and, if he does, setting up insanity, he
* 92 shall not have costs, unless he establishes *it; and, if it should appear that, knowing the devisor was perfectly sane, he set up that pretext, he would fall within the scope of Lord *Hardwicke's* exception.

There is no foundation for saying this testator made this will under any undue influence. He was not a person living in great privacy; that mode of life connected with singular manners, not giving an opportunity of knowing the state and character of his mind; but a nobleman, appearing in the magistracy, the House of Lords, and in public life. Yet, though a clearer case could not be made out to the satisfaction of the Court than was made out upon this trial, whatever delusion the heirs fell into, I cannot say they wickedly and fraudulently contested this will, so as to fall within the exception stated by Lord *Hardwicke*. This, therefore, though the will is fully entitled to protection, is not a case in which I ought to give the costs of the trial of the issue. As to that there must be no costs on either side. But I must give the costs of the motion for a new trial, to be paid by the heirs; and they must have their costs in equity.

1806.

## WARTER *against* ———.

*November* 13.

Where the Court can be satisfied that the fund is clear, an allowance for maintenance will be allowed, pending the account, to the residuary legatee: not if an accounting party.

UNDER a bill for an account against a devisee in trust and executor, a motion was made on the part of the daughter of the testator, being general residuary devisee and legatee for life under the will, *that pending the accounts she may have an allowance out of the rents and profits and dividends for maintenance.

* 93

Mr. *Alexander* and Mr. *Bell* in support of the motion.

In *Wear* v. *Wilkinson*, the testator bequeathed all the residue of his personal estate to his brother and sister. The defendant *Wilkinson*, who was one of the executors, for some time made them an allowance, which, when they filed the bill for an account, he withheld; and an application of this sort was made to Lord *Rosslyn*. The answer stated, that all the debts were not paid, and that some accounts with government, the testator having been Commissary-General, were unliquidated. Lord *Rosslyn* ordered an allowance of 800*l.* a year for their maintenance, until the accounts should be taken. Applications of the same kind have been made since; one to your Lordship upon petition. The Court will take care that creditors shall not be injured: but when satisfied as to that, will not permit the residuary legatee to starve. The affidavit states, that the peremptory day, appointed by the Master for creditors to come in, expired on the 23d of last *May*, and she believes no creditor has come in. The income of the whole property is something more than 200*l.* a year; of which 73*l.* was rents and profits of real estate.

Mr. *Sprange*r for the defendant, objected, that this daughter was entitled only for life with remainders over, if entitled to any thing; which depended upon a question, whether by marriage she had not incurred a forfeiture, also, that the case made by the defendant, was, that she

1806. Warter v. —— had received large sums during her father's life, without his knowledge; and *had possessed part of his personal estate since his death. She is therefore an accounting party; and upon these grounds the decree for an account was made at the Rolls against her, as well as the trustee.

* 94

Mr. *Alexander*, in reply, said that her examination stated, that she had laid out more than she had to account for.

The Lord CHANCELLOR.

The general rule is admitted, that the Court ought not to take any sum from a trustee for the residuary legatee, until the fund appears clearly free from incumbrances. But I very willingly accede to the practice which began in *Wear* v. *Wilkinson*; and is very just on account of the delay in taking the accounts; that when the Court can see clearly, that there will be a clear fund, the residuary legatee shall have an allowance for maintenance in the mean time. But I take it, in that case there was no mutual account. The question was only as to the incumbrances; and then, the time given by the advertisement for creditors to come in having expired, the Court is safe in granting an allowance. But this lady has received part of the effects. Her examination shews, that she is an accounting party; and the balance may turn against her.

No order was made.

1806.

## LOWTHER *against* LORD LOWTHER.

*Nov* 10, 11, 12 14. 17.

Jurisdiction by bill in equity for the delivery of a specific chattel

A valuable picture, deposited by an executor with a dealer in pictures, and claimed to be retained by him as purchased at a very low price issue directed to ascertain whether there was a sale, or the possession was as agent, and trustee for sale, who therefore could not purchase without full communication

An objection, that the transaction not being in the usual course of administering assets, could not protect a purchaser from the executor, was therefore not determined

THE object of this bill, filed by parties, entitled under the will of Lord *Lonsdale* to his personal estate, was to have a picture delivered up by the defendant *Bryan;* having been deposited with him as an agent, for the purpose of being exchanged for other pictures, by the other defendant Lord *Lowther*, the executor of Lord *Lonsdale:* *Bryan* claiming to retain it, as purchased by him, under the following circumstances:

The picture, the subject of which was *Mars* and *Venus*, having been cleaned, was considered as a valuable original. On the 9th of *May* a conversation took place between *Bryan* and a friend of Lord *Lowther's*. That gentleman by his depositions represented his proposal on the part of Lord *Lowther*, to which *Bryan* agreed, that *Bryan* should immediately allow the value of 300 guineas in pictures: and account for whatever more the picture might produce.

*Bryan*, by his answer, denied that; and stated, that upon his declining to set a value upon the picture, and desiring the witness on the part of Lord *Lowther* to do so, the witness set the value of 300 guineas upon it, that the defendant *Bryan* then did offer to give Lord *Lowther* an engagement to account in pictures for any farther produce above 300 guineas, which, being on the part of Lord *Lowther* declined, the defendant considered it as sold to him. He afterwards allowed the farther value of 100 guineas, assigning as a reason, that the picture turned out better than he had expected; and he made a subsequent offer of 400 guineas more *by a letter to the witness; who applied to him by the direction of Lord *Lowther* to get it back. The picture, however, having excited much attention, was pronounced to be a *Titian* of great value: *Bryan* by his answer admitting it to be worth 5,000*l.*

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For the plaintiffs, and the defendant Lord *Lowther*, it was insisted, that the evidence against the answer of *Bryan*, as to what passed upon the 9th of *May*, was supported by another witness.

The *Solicitor-General*, Mr. *Fonblanque*, and Mr. *Thomson*, for the plaintiffs.

The *Attorney-General*, and Mr. *Wingfield*, for the defendant Lord *Lowther*.

No doubt can be entertained of the jurisdiction of this Court for this purpose.(a) The ground is the same as that, upon which the specific performance of an agreement is enforced; that the specific thing is the object; and damages cannot be a compensation.

(a) *Fells* v. *Read*, *ante*, vol. 3 p. 70. *Lloyd* v. *Loaring*, *ante*, vol. 6. p. 773.

The question is, whether the defendant *Bryan* can be considered a purchaser for valuable consideration, without notice. The first objection is, that he was an agent, bound as a trustee, to make the most of this picture, and to account for the produce. As an agent and trustee he could not purchase from his principal, without giving him the benefit of all the information possessed by the agent. The object of this defendant, giving the additional sum of 100 guineas afterwards, could be no other than to throw off the character of agent, *and convert himself into a purchaser, when he had discovered the value of this picture; and the farther offer of 400 guineas more was from the same motive, to give the colour of a fair equivalent.

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As agent for Lord *Lowther*, he was bound to exert his skill to make the most of this picture, and to give to his principal the benefit of all his information, especially in this case; a professed dealer in pictures; the other party a nobleman, ignorant of the art, supposing this a picture of inconsiderable value, which on account of the subject he wished to exchange. In order to give validity to the

new contract, *Bryan* should have communicated every thing, that this was a most valuable picture, by *Titian*. Suppose a mine discovered upon an estate by an agent; who, purchasing from his principal, conceals the fact, saying only that it will turn out better, and therefore he will give 100 guineas more: would such a contract be endured in this Court? The subsequent letter of *Bryan* to the witness, on the 26th of *May*, shews the transaction was not finally arranged, that letter making a farther offer of 400 guineas to a person authorised only to get back the picture, not to make a compromise as to the price.

The next objection is the admitted character, in which Lord *Lowther* was acting, as legal representative of Lord *Lonsdale*; *Bryan* apprised therefore that this picture was part of Lord *Lonsdale's* personal estate. The proposition cannot be maintained, that an executor can make a title to a specific chattel, unless it is disposed of in a course of administration. Suppose the object of this suit was to restrain Lord *Lowther* from selling this picture. This Court has not gone the length of deciding, that under all circumstances an executor can make a title to any part of the testator's estate. *The contrary was settled by the House of Lords, reversing the decree in *Humble* v. *Bill*.(a) It has been supposed that Lord *Hardwicke*, in *Nugent* v. *Gifford*,(b) and *Mead* v. Lord *Orrery*,(c) had impeached that determination, but in the late case of *Hill* v. *Simpson*,(d) the authority of *Humble* v. *Bill*, is so far recognised, that the doctrine is brought back to what it was originally; that a person dealing with an executor, evidently not in that character, the transaction falling within no part of the duty of an executor, is bound to see that he has a power beyond what belongs to that character. If these pictures had been sold for a return in money, the argument might have been urged, that it was necessary to pay debts; but, the nature of the dealing being exchange, the terms of the contract are decisive evidence, that the executor was dealing, not with a view to any purpose of administration, but upon

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(a) 2 Vern. 444. 1 Bro. P. C. 71.

(b) 1 Atk. 463. cited 2 Ves. 269. Stated by the Master of the Rolls, 4 Bro. C. C. 136. from the register's book.

(c) 3 Atk. 235.

(d) Ante, vol. 7. p. 152

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some speculation. In this respect there can be no difference between chattels real and personal. The former are equally applicable to debts, and the executor acquires no higher title in them. A Court of Equity must consider a transaction, not within the line of the executor's duty, as void with reference to third persons. The whole law on this subject is stated in the very able judgment of the Master of the Rolls in *Hill* v. *Simpson*;(e) stating the result of all these cases, that an executor exercising his legal title according to the due course of law, has an uncontrouled power to sell; but, if he is dealing evidently for his own benefit, not in the way required by his duty as executor, for instance, pledging the assets for his own debt, or exchanging *for something for his own use, the owner has a right in this Court to have the specific thing delivered up.

(e) *Ante*, vol. 7. p. 152.

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The inadequacy of the consideration, as represented by *Bryan*, is so gross as to excite surprise in any one, according to Lord *Thurlow's* expression;(a) and alone furnishes a sufficient ground for setting aside the contract: this defendant contending that he is to have for 800 guineas, property which he admits to be worth 5,000*l.* If the last transaction upon the 26th of *May*, when he offered 400 guineas more, as a final arrangement had been compleated, that contract must have been set aside upon the bill of Lord *Lowther*; and the only consideration would have been upon what terms this personal chattel should have been restored.

(a) See 1 *Bro C. C.* 9.

Mr. *Perceval* and Mr. *Trower*, for the defendant *Bryan*.

The only question is whether the property was changed, or whether this was a deposit with an agent. The effect is a distinct and absolute sale. The case of *Hill* v. *Simpson*,(b) has no resemblance to this. That was a transfer by an executor, insolvent at the time, for his own debt within two months after the death, to a person acquainted

(b) *Ante*, vol. 7. p. 152.

with his situation. But is there any case of a solvent executor known to be so, administering the effects of a most solvent testator, infinitely beyond any demand upon them, the executor himself beneficially interested, no risk of prejudice to the estate, that under such circumstances fraud has been presumed; and, a disposition of part of the assets *has been held a *devastavit*? *Taylor* v. *Hawkins*,(a) shews there is no general rule, that an executor may not dispose of the assets, though the effect should be to defraud a creditor. In *Farr* v. *Newman*,(b) and *Whale* v. *Booth*,(c) the general rule is stated the other way, that an executor may dispose of the assets, that his power over them is absolute, and they cannot be followed, with the single exception, where there is a contrivance of a *devastavit* between the executor and the purchaser. That was the origin of all these cases, breaking in upon the general rule. In *Quick* v. *Stains*,(d) Lord Chief Justice *Eyre* certainly expresses strong dissent from the doctrine of the three Judges against the opinion of *Buller*, Justice, in *Farr* v. *Newman*.(e)

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(a) *Ante*, vol. 8. p. 209.

(b) 4 *Term Rep.* 621.

(c) 4 *Term Rep.* 625. note.

(d) 1 *Bos. & Pul.* 293.

(e) 4 *Term Rep.* 621.

Then as to the principal question, whether this picture was deposited with *Bryan* for sale, and he was to advance 300 guineas upon it in the first instance, and to account for any produce beyond that sum, the alleged agreement for that is distinctly denied by the answer, and the evidence cannot prevail against that denial. The conclusion is clear, that Lord *Lowther* intended to sell this picture altogether; not to incur the risk of cleaning, &c. taking upon himself a speculation so uncertain as to the result. If *Bryan* can be considered as an agent, certainly this transaction cannot stand as a sale.

The *Solicitor-General*, in reply.

The admission that if *Bryan* was an agent, this cannot stand as a sale, reduces the case to a very short question of

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fact. Here are two witnesses against the *answer: but, taking it as if there were one only, this answer cannot prevail upon the rule, that is relied on. That rule, adopted from the civil law, with great reluctance, is taken most strictly. The denial must be positive; and under such circumstances, that the Court must give credit to it: otherwise it shall not prevail.(a) The rule does not receive much favour; not standing upon any satisfactory reason. The rules of evidence do not compose the most admirable part of the civil law; proceeding upon a sort of arithmetical proportion, according to the number of witnesses; concluding therefore, that between the affirmation of one, and the denial of one, there is perfect equality. But is that conclusion just, where the witness is perfectly indifferent, and the denial by a party, who has every thing at stake? This denial is followed by an admission, that the defendant did offer to make the engagement, stated by the witness, who declined to accept it; and therefore the defendant considered the picture as fairly sold to him: the slightest distinction possible. There may be no great inconsistency between that and the account of the witness: the one construing silence an acquiescence: the other giving it the effect of declining the offer. Was it fair dealing to desire the other to set a price, not then saying, he would give that; but, when a low price was named, then declaring he would give it, with an offer of what more should be produced; and as no answer was given, concluding, that the offer was declined?

It appears by the answer, that *Bryan* knew the value of
* 102 this picture was 5,000*l.* immediately after he *had cleaned it. He represents, that he formed his opinion upon his own examination of the picture, after it was cleaned, not upon the judgment of any other person. He was bound to sell

(a) The denial, if positive, prevails against the single witness, unless confirmed by circumstances. *Evans* v. *Bicknell*, *ante*, vol. 6. p. 174. See p. 185. *East-India Company* v. *Donald*, *ante*, vol. 9. p. 275.

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this picture. This Court would have compelled him to sell it, if he had delayed for any length of time. It was sold to him for that purpose. He was collecting pictures for sale only. He must be considered a trustee for sale in every respect. If he had put it up to auction, and purchased it himself in another name, and afterwards sold it at a profit, he would have been a trustee as to that. He admits, he was not to make profit by that picture. His profit was to be only upon the pictures he was to give in exchange. The clear result is, that he must be considered as an agent. How can the addition of 100 or 400 guineas be reconciled with fair dealing, if at that time he had any idea of the value?

As to the point upon the purchase from an executor, all the authorities concur to this extent; that where the executor clearly is not dealing for the purposes of administration, the purchaser is bound to go farther; and to see that the executor has the equitable, as well as the legal title.

The Lord CHANCELLOR.

There is only one point upon which I wish not to determine immediately; not from any doubt of the principle, upon which this case ought to be decided; but, as it is reduced to a question of fact, which depends not only upon the general tenor of the deposition, but may turn upon the language.

Considering the defendant *Bryan* as an agent, the principle upon which a Court of Equity acts in cases *of this kind is very properly admitted; having been settled in many instances, particularly in the time of Lord *Eldon*;(a) resting upon grounds, connected with the clearest princi- * 103

(a) See *Coles* v. *Trecothick*, *ante*, vol. 9. p. 234. *Morse* v. *Royal*, *ante*, vol. 15. p. 355. and the references.

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ples of equity, and the general security of contracts; viz. That an agent to sell shall not convert himself into a purchaser; unless he can make it perfectly clear, that he furnished his employer with all the knowledge, which he himself possessed. The admission of that principle reduces this case, except as to the right of an executor to deal in this way, to the question, whether upon the 9th of *May*, *Bryan* became the purchaser of this picture at the price of 300 guineas; for the additional sum afterwards advanced, must be considered as gratuitous upon his part; as a man, who, having by a bargain, which the law would support, obtained an article much more valuable than he supposed, might be induced by his own spontaneous honour to throw in some farther consideration. If *Bryan* had himself set the value of 300 guineas upon this picture, the decision must have been against him immediately: the condition of the parties being so unequal; and though inadequacy of consideration is not of itself a sufficient ground for setting aside a contract, it is, when gross, strong evidence of fraud.(*b*)

Inadequacy of consideration, though not of itself a sufficient ground for setting aside a contract, is, when gross, strong evidence of fraud.

But this circumstance exists in the case; upon which alone my mind has balanced; and I continue to doubt, whether this defendant, if he insists upon it, is not entitled to an issue as to that. Upon the 9th of *May*, *Bryan* refusing to put a price upon the picture, the friend of Lord
* 104 *Lowther* set the price of 300 guineas. *I cannot, upon the evidence alone, attribute fraud to *Bryan*; closing with that proposition, coming from the friend of the seller, and a person not ignorant upon the subject. I cannot attribute more knowledge to *Bryan* at that time, before this picture had undergone that process, by which its pristine beauty was restored. The rejection of the offer by *Bryan*, according, as he represents, to the ordinary course of his trade, to account for any farther produce, seems extraordinary;

(*b*) See *Mortlock* v. *Buller*, *ante*, vol. 10. p. 292.

Whether upon the 9th of *May* a specific contract took place, depends upon the evidence of these witnesses; whose cross-examination in a Court of Law may give the case a different shape.

The other part of the case involves a question of great importance. I have read the report of *Hill* v. *Simpson*.(a) A more accurate and truly learned judgment never was pronounced than that of the Master of the Rolls; bringing together all the cases, and deducing the principle, depending upon the point, whether in the nature of the dealing it appears, that the executor was not acting in the execution of his trust, and the distribution of the assets; in which case it is incumbent upon the purchaser to inquire farther than the mere title, as executor. If *Bryan* was not a purchaser for 300 guineas upon the 9th of *May*, that principle cannot come in question in this case. The question for the issue will be, whether it was agreed upon the 9th of *May*, that *Bryan* should purchase this picture absolutely for 300 guineas, to be estimated in pictures; or whether he was to be accountable for any farther produce.

(a) *Ante*, vol. 7. p. 152.

The Lord CHANCELLOR directed the issue.

## *HUGONIN *against* BASELY.

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November 13. 20. 22.

Receiver upon motion against the legal estate under a conveyance, upon a strong suspicion of abused confidence, arising upon the answer.

THE case represented by this bill, was, that the plaintiff, Mrs. *Hugonin*, being entitled to an estate in *Jamaica*, in fee-simple, within three months after her return from the *West-Indies*, being then a widow, executed a conveyance to the defendant, who was a clergyman, in fee-simple, subject to the payment of an annuity of 400*l*. to herself for life. A letter to the solicitors, who were in possession of the title-deeds, admitted by the defendant to have been written by him, but from her dictation, lamented her desti-

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tute situation by the death of her husband; and stating that Providence had sent her a friend to manage her affairs to advantage, concluded with a direction to deliver up the deeds, and to settle her account with the defendant.

The estate had been let for one year at 600*l.* but that was accounted for by the circumstance that it was let to a person who had an estate contiguous, and it was admitted that upon survey the annual value did not exceed 450*l.*

Under these circumstances, admitted by the answer, a motion was made for a receiver. The solicitor, who prepared the conveyance, was made a party, as he claimed a lien upon the deeds for his costs. He stated that he cautioned the plaintiff against making the conveyance.

The *Solicitor-General*, Mr. *Hollist*, and Mr. *Trower*, in
* 106 support of the motion, insisted, that this defendant, *standing in the character of a trustee, could not possibly take a bounty from the *cestui que trust*, and that the circumstances of this case raise great suspicion. They cited *Vann* v *Barnett*,(a) and *Shelly* v. *Lloyd*,(b) as authorities for granting a receiver before the hearing, against a person having the legal estate and claiming the beneficial interest.

Mr. *Perceval*, Mr. *Richards*, Mr. *Hart*, Mr. *Martin*, and Mr. *Wetherell*, for the defendant.

The cases of *Vann* v. *Barnett* and *Compton* v. *Beancroft*, were both cases of an attorney. Except in such cases the attempt to get a decision upon the right in this way, by a mere suggestion that the conveyance was improperly obtained, has never been made. The authority given to this defendant by the letter to the solicitors to get the deeds, and settle her account, is not sufficient to bring him within the principle of attornies, agents, and trustees.

(a) 2 Bro C. C. 158. In that case and *Compton* v. *Bearcroft*, cited in the note, it was before answer. See *Jervis* v *White*, *ante*, vol 6 p. 738

(b) In the Court of Exchequer.

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Two distinct questions arise: 1st. Whether so strong a probability of title appears upon this bill and answer, as will induce the Court, upon the principles on which it acts, to consider this plaintiff as having a strong interest to have the estate secured, in case she should obtain a decree: 2dly. Whether this defendant having the legal estate by adverse title, not being a trustee by his admission, a receiver ought to be appointed by interlocutory order on motion. The decree in the case of *Purcell* v. *M'Namara*(c) did not proceed upon *the connection of attorney and client, or trustee and *cestui que trust*; nor upon the ground that the plaintiff did not know what she was doing. That decree was made and affirmed upon a principle, not connected with any such technical relation, that the answer admitted, according to the letter, admitted by this answer, that the plaintiff and her sister were under the particular protection of the defendant, who ought not to have permitted them to make a deed in his favour; that they looked to him for advice, and were entitled from him to protection of their property. There were repeated ratifications, and a lapse of 20 years between the execution of the deed and the hearing of the cause. The Master of the Rolls distinctly put his opinion upon that clear principle. All fraud and undue influence were denied; and the conveyance was represented by the answer as a deliberate voluntary act in favour of the defendant and his family.

(c) *Post*.

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I admit, I am not in this way to decide, or prejudice, this cause. All that it is necessary to say, is, that there is a very strong probable title in the plaintiff to call back this estate upon such terms as may seem proper at the hearing; which she appears to have conveyed under such circumstances; reserving only an interest for life. The question then is, whether, whatever may be my opinion of the complexion of this case upon the bill and answer, I ought to interfere by appointing a receiver. A very strong case has been

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(a) 2 Bro C. C 158

produced in favour of that. In *Vann* v. *Barnett*(a) the defendant had the legal estate in trust to pay himself. But, as one of the ruling principles of this Court is, that there must be some evil actually existing, or some evidence of danger to the property, if the Court *should not interfere to induce it to act in this stage of a cause, as in the instance of waste, though I have a strong inclination to grant a receiver, I will look into the authorities before I determine.

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Under all the circumstances of the case I have no doubt of the jurisdiction to appoint a receiver. But, in order to avoid the expense of that, the plaintiff being entitled for her life to an annuity, admitted to be very near, if not quite, equal to the rents, I propose an inquiry what arrears of the annuity are due: the defendant to pay the amount forthwith; to give security for the future payments, and to account for the rents and profits.

The order was drawn up accordingly.



## HIXON *against* OLIVER.

*Nov.* 17, 18

Bequest to the testator's wife of 60*l* a year for life, "and the sum of 300*l*. to be disposed of as she thinks proper, to be paid after her death," and a leasehold house and furniture for life: an absolute interest in the 300*l* transmissible to the administrator, not a mere power of appointment

Will not construed by reference to a settlement, the provisions differing in some respect, though a substitution was intended.

Distinction between repugnancy and a qualification.

BY a settlement, previous to the marriage of *Abraham Oliver* with *Faithy York*, lands in *Easington*, held by lease for three lives under the bishop of *Durham*, were conveyed in trust after the marriage for *Abraham Oliver* for life;

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and, after his death, in trust, by mortgage, *or out of the rents and profits of the premises, to pay to *Faithy York*, during her life, the yearly sum of 60*l.* at the time therein mentioned; and in trust by mortgage or sale of the premises, or by all and any of the same ways and means, to raise within six calendar months after the decease of *Abraham Oliver*, the sum of 300*l.* and pay the same to such persons and for such purposes as she the said *Faithy York* by deed or will should appoint; and in default thereof it was declared, that the said sum, or so much whereof no such appointment should be made, should not be raised. By another deed, also previous to the marriage, a house, held by lease for 40 years, from the dean and chapter of *Durham*, was assigned to the same trustees, in trust for *Abraham Oliver* for his life; and after his death for *Faithy York* for her life; and after her death for *Abraham Oliver*, his executors, administrators, and assigns.

*Abraham Oliver* by his will, dated the 5th of *December*, 1801, made the following disposition:

"To my dearly beloved wife *Faithy Oliver* 60*l.* a year "as her dowry, to be paid quarterly by my executor from "the day of my death, and the sum of 300*l.* to be dispo "sed of as she thinks proper, to be paid after her death, "and also my leasehold dwelling-house and furniture du- "ring her natural life."

The testator died soon after the date of his will; and his widow survived him about a month, and died intestate; not having disposed of the legacy of 300*l.* The bill was filed by her administrators against the executor and residuary legatee of *Abraham Oliver*, praying payment of the legacy of 300*l.*

*The defendant by his answer submitted, that the will was merely intended to be a confirmation of the settlement, so far as relates to the sum of 300*l.*; and that *Faithy Oliver* * 110

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had only a power of appointment over that sum, and no property or vested interest therein by virtue of the will; and, as she died intestate, and without making any appointment of the said sum of 300*l.* it ought not to be raised; and the plaintiffs are not entitled to it.

(*a*) 2 *Vern* 181
(*b*) 1 *P Wms.* 149 *Salk* 239. 10 *Mod.* 31. *Com* 194. 2 *Eq Ca. Ab.* 309 *pl* 13
(*c*) *Ante*, vol 7 p. 499 vol. 12. p 206.

Mr. *Richards* and Mr. *Hall*, for the plaintiffs, upon the authority of *Robinson* v. *Dusgale*,(*a*) *Tomlinson* v. *Dighton*,(*b*) and the several other cases, referred to in *Holmes* v. *Coghill*,(*c*) contended, that the interest in this legacy of 300*l.* was absolute property, as distinguished from power. These cases shew, that the Court has in various instances, where the words might have imported the contrary, given an absolute interest to the devisee or legatee. What is there in this will to prevent that construction? Both the annuity of 60*l.* and the sum of 300*l.* are given by the same clause, and the bequest of the latter is a continuation of the sentence, and a direct bequest, as much as the annuity of 60*l.* and the leasehold property, mentioned afterwards. An absolute interest being given in the first instance, the subsequent words, if repugnant, may be rejected. *Com. Dig. Dev. N.* 7.

The *Solicitor-General* and Mr. *Martin*, for the defendant.

There is no way in which the testator's widow can have any personal enjoyment of this legacy. The effect is a mere power to dispose of this sum as she thinks proper.

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(*a*) 1 *P Wms* 149 *Salk.* 239. 10 *Mod.* 31 *Com.* 194. 2 *Eq. Ca Abr.* 309. *pl.* 13.

She must make an appointment, and *that must be done by deed or will. In *Tomlinson* v. *Dighton*,(*a*) the persons to be the appointees, were pointed out; and the intention was, that the wife should have some species of property, viz. The enjoyment for life. If there is any doubt upon this will, it is cleared by the settlement; which may be resorted to in aid of the construction; as the provision by the will is a substitution for that by the settlement, and according to the authorities upon the subject of satisfac-

tion, one of the strongest of which is *Copley* v. *Copley*,(b) she could not have both. In a late case, at the Rolls, *Fisher* v. *The Bank of England*, a sum of money was given to be paid to a woman for life; and afterwards as she shall dispose; and it was held only an interest for life, with a power; and the same point was decided in *Reid* v. *Shergold*.(c)

(b) 1 *P. Wms.* 147.
(c) *Ante*, vol. 10. p. 370.

The Lord CHANCELLOR.

The words that immediately follow the legacy of 300*l.* are not repugnant. They form a qualification of the legacy; for the payment is postponed.

I shall look into the authorities: but I have formed an opinion upon this point. This is a question of intention, which the Court can get at only by the words of the will. Several cases have been cited. In *Maskelyne* v. *Maskelyne*,(d) it might have been argued, that the disposition must have been intended to be by will; and that without such disposition the money was not due; for if the property was absolutely his own, it was needless to insert that direction, that he might dispose of it by will. So in other cases that have been cited, it might have been argued, that by the frivolous words *introduced, it was not intended to give the absolute interest; as the law would supply that power. What is the distinction in this will? There are in the first instance, words sufficient to convey this sum, as absolute property. Then follows the qualification, restraining the payment, upon such application of the fund as she may make, until after her death. It would be too much to put upon the will a construction, which it will not of itself bear by reference to the settlement; for, though it is true, according to the cases of satisfaction, that she is not entitled to both provisions, and the legacy is in effect a substitution for the provision by the settlement, yet it may not be the same thing, and there may be a variation of intention; the legacy being given according to her absolute dis-

(d) *Amb.* 750.

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position; not depending upon the execution of a deed or will. It will turn upon the effect of the words "to be paid "after her death." Such words as those do not occur in any of the cases that have been cited; and if they were not in this will, she could immediately have called for the money: but they have the appearance of an intention, that the money should be paid after her death to some person, to be appointed by her. At present I think she was absolutely entitled.

*November* 1[illegible].

The Lord CHANCELLOR.

The opinion that I threw out yesterday, is confirmed; that this will gives to the widow, not only the annuity of 60*l.* as to which there is no question, but also the legacy of 300*l.* at her absolute disposition; and therefore her administrators are entitled to file this bill. This judgment is supported, not only by the authority of the numerous cases that have been referred to, but also by general principle.

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*The first of those cases is *Robinson* v. *Dusgale*,(a) which cannot be distinguished from this. The case(b) there cited from Lord *Hobart*, is clearly right. The party was to be called upon to pay only in the event provided. In *Maskelyne* v. *Maskelyne*,(c) the same point was decided upon that authority by Sir *Thomas Sewell*, a very eminent Judge. Compare the words in those cases, with those of this will. The difference is in favour of these plaintiffs. If this legacy had been expressed merely to be disposed of as she thinks proper, it would be clearly within the preceding cases; and, the subsequent direction, "to be paid "after her death," strengthens the construction upon the various authorities; that a legacy, not given at a future time, but given to be paid at a future time, is a vested

(a) 2 *Vern.* 181.

(b) *Pease* v. *Mead*, *Hob* 9.

(c) *Amb* 750

Distinction between a legacy, given at a future time, and a legacy, given to be paid at a future time: the latter vested, and payment only postponed; the time being annexed, not to the legacy, but to the payment only.

legacy; the time being considered annexed not to the legacy itself, but to the payment only. All those cases are collected by Mr. *Roper*.(*d*) This therefore was a legacy vested, but not due till after the death of the legatee. She could dispose of it as she thought proper, not being confined to a disposition by will; and the person to whom she might have thought proper to dispose of it, would have stood in her place, entitled to receive it from the assets.

(*d*) *Roper* on *Legacies*, c. 5.

The settlement at first made some impression upon me; upon which it was ingeniously argued, that the intention was to give by the will the same interest that had been before given by the deed. That was properly given up in the reply, as there is a difference between the two clauses. The case of *Holmes* v. *Coghill*,(*e*) in which I concurred in all the principles stated by the *Master of the Rolls, strongly supports this decision. The Master of the Rolls held, that powers must be express, and must be strictly construed, and seems to think, Courts of Equity were not altogether warranted in supplying defects in the execution. The want of execution they cannot supply. Certainly it is not easy to understand the principle upon which the Court has gone to such an extent upon that subject.

(*e*) *Ante*, vol. 7. p. 499. vol. 12. p. 206.

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Powers must be expressed, not implied; and are construed strictly. Though defects in execution are in certain cases supplied in equity: the want of execution cannot be supplied.

In this case, however, it is enough to say, that as power is a restraint upon property, it is never to be implied; that this is a direct bequest of property, and therefore the plaintiffs are entitled.

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## HIERN *against* MILL.

*November* 18. 20.

Equitable mortgage by deposit of title-deeds preferred to a purchase with notice.
Evidence in writing, not admitted, as an agreement unstamped, does not prevent parol evidence, if otherwise admissible.
Relief under the general prayer; if consistent with the case made by the bill.

THE bill stated, that in *January*, 1798, the defendant *Mill*, being indebted to the plaintiff in 250*l*. for securing

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the repayment with interest, proposed to enter into a bond, and also to make a mortgage to the plaintiff of a real estate, called *Upcott;* to which proposal the plaintiff consented, and accordingly *Mill* executed a bond, dated the 11th of *January*, 1798, with condition for payment of 250*l.* with interest, on the 11th of *July* next; and he at the same time left in the hands of the plaintiff certain title-deeds, which he represented to be all the title-deeds, by way of mortgage, pledge, and security, for repayment of the said sum, &c. till regular deeds of mortgage could be made and executed; and, all such deeds have ever since been in the custody of the plaintiff.

The bill farther stated, that the plaintiff having after-
* 115 wards made farther advances, by an account, settled *in *November*, 1799, *Mill* appeared to be indebted to him in the farther sum of 100*l.*; and upon that occasion proposed giving another bond to the plaintiff for securing that sum, and forthwith making a formal mortgage of said estate, as well for securing that sum as said 250*l.* with interest as aforesaid; and accordingly executed another bond, dated the 14th of *November*, 1799, for payment of 100*l.* with interest, on the 14th of *May* next; and at the same time again undertook to execute a regular mortgage of said estate to plaintiff for securing both sums with interest forthwith; and that in the mean time the plaintiff should hold his title-deeds as a security for the same; and the plaintiff accordingly tendered deeds of mortgage for execution; which, though approved by *Mill*, were never executed, and another sum of 20*l.* was also due by the defendant *Mill* to the plaintiff, for business done as an attorney; for which sum the defendant at various times agreed that the said estate should be, or the said title-deeds should remain in the hands of the plaintiff, as a security also.

The bill therefore prayed an account, and in default of payment, a conveyance of the estate, charging that the other defendant, *Arnold*, claiming under a conveyance to him for

valuable consideration, had reason to believe, at the time of taking such conveyance, that the title-deeds were in the hands of the plaintiff by way of mortgage, &c.

The answer of *Mill* stated, that the deposit of the deeds was for the sole purpose of preparing a mortgage to *John Quarne;* and denied that it was for the purpose stated in the bill, or any other purpose. Both the defendants stated that the estate was advertised for sale before *Arnold's* purchase; and *Arnold* denied notice, *or that he had any * 116
reason to suspect that the deeds were left in the plaintiff's hands by way of mortgage, &c. or that the plaintiff had any claim or lien thereon; the defendant believing that they were only deposited, and held by the plaintiff, as security for *Quarne.*

The evidence for the plaintiff proved a tender of the mortgage-deeds to *Mill* for execution in 1800; that he did not execute them, being ill; stating, that on that account he could not execute them, but that he would call on the plaintiff in a few days, and execute.

*Mill's* attorney by his deposition stated, that he approved the mortgage on the the part of *Mill;* who said, he would return it to the plaintiff to be engrossed; and informed the deponent, that he owed money to the plaintiff, and the deeds of the said estate were in his hands. A prior mortgagee stated that he delivered the deeds to the plaintiff at the request of *Mill*, who said he wanted to raise more money upon the estate. It was also proved, that the plaintiff gave distinct notice of his claim to the person who advertised the estate, and to *Arnold.*

The *Solicitor-General*, and Mr. *Hart*, for the plaintiff.

Upon the answers and evidence *Arnold* cannot be considered a purchaser for valuable consideration without notice of the plaintiff's equitable incumbrance, and therefore

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must be postponed. Something more than is disclosed must have taken place; for it cannot be supposed, that any man would purchase an estate, as free from incumbrances, without any outstanding term to protect him, and not ask a single question about the title-deeds. Some
*117 rational account is required, that *he was misled in his inquiry; shewing that he was not grossly negligent. This subject of priority, with reference to the possession of title-deeds, was considered by Lord *Eldon*, in *Evans* v. *Bicknell*,(a) though the point in that case does not directly apply to this.

(a) *Ante*, vol. 6. p. 174. See 183 190

Mr. *Hollist*, Mr. *Trower*, and Mr. *Spranger*, for the defendants, insisted upon the statute of frauds,(b) and the case of *Brown* v. *Selwin*,(c) in which, it was said, it appeared by the decrees, that the House of Lords held, that neither the answer nor the evidence ought to have been read: that in this case parol evidence could not be admitted; there being an agreement in writing, which, though proved, could not be admitted in evidence; not being upon a stamp. They also objected to a variation of the specific relief, proposed under the general prayer.

(b) Stat. 29 *Car.* II c 3.
(c) *For.* 240.

The *Solicitor-General*, in reply.

The objection to receiving any parol evidence in this case would go to a great extent. All the decrees establishing an equitable mortgage by a deposit of deeds, as in *Russel* v. *Russel*,(d) are upon parol evidence. That case has been followed in various instances: to the extent even of administering the equity in bankruptcy; so that a bill has not been considered necessary. Though there is an agreement in writing, if not upon a proper stamp, other evidence may be received; as in the case of a receipt, not upon the proper stamp.

(d) 1 *Bro C. C.* 269 See *Norris* v *Wilkinson*, *ante*, vol 12 p.192 and the note (a), p. 197.

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*Upon the other point, the doctrine is very well stated in *Equity Cases Abridged*:(a) " *A.* makes a conveyance to *B.* " with power of revocation by will; and limits to other " uses. If *A.* dispose to a purchaser by the will, another " purchaser subsequent is intended to have notice of the " will, as well as of the power to revoke; and this is, in law, " notice; and so it is in all cases where the purchaser can- " not make out a title but by a deed, which leads him to " another fact, the purchaser shall not be a purchaser with- " out notice of that fact, but shall be presumed cognisant " thereof; for it is *crassa negligentia* that he sought not " after it."

(a) 1 *Eq. Ca. Ab.* 331. Pl. 7.

A man seeing another in possession of the estate, must make farther inquiry; and is equally bound to inquire farther, finding the title-deeds in the possession of another.

The relief now desired may be had under the general prayer; being consistent with the case made by the bill. In the late case of *Soden* v. *Soden*, your Lordship refused the relief, desired under the general prayer, as being quite inconsistent with the case made.

The Lord CHANCELLOR.

The doctrine of notice, as it affects purchasers, is of such immense consequence and extent that I shall look through the cases upon that. Upon the remainder of this case I have no doubt. It is clear the defendant, *Mill*, knew he had given an equitable mortgage. I should have received the agreement, if it had been upon a stamp, only as an acknowledgment that he had *at a prior time delivered the deeds as security, not only for the debt then due but also for such sums as the plaintiff should afterwards advance. The purpose of the first deposit is not material. For what purpose were the deeds continued in the plaintiff's posses- *119

1806 sion, which is proved beyond a doubt by the strongest evidence besides the paper, which I cannot receive?



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The question as to *Arnold*, is, whether he is affected by notice in fact or law, upon which I shall look into the cases. There is something extraordinary as to the time at which he became a purchaser. There is a marked distinction in this respect between a real estate and a personal chattel. The latter is held by possession: a real estate by title. Possession of an estate is not even *prima facie* title. It may be by lease, or only from year to year. The cases have gone upon that distinction. Is there any instance of a purchase upon mere possession? If the vendor, being asked, acknowledges to the purchaser that the deeds are in the possession of another, who is to be postponed? Here is *crassa negligentia;* which, coupled with positive evidence of knowledge a year before the purchase, raises a case for a decree against *Arnold*, if the proceedings are sufficient in form.

Distinction between land and a personal chattel: the latter held by possession, the former by title, of which possession is not even *prima facie* evidence.

As to that the rule is, that, if the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer; but he cannot desert specific relief prayed, and, under the general prayer, ask specific relief of another description, unless the facts and circumstances, charged by the bill, will, consistently with the rules of the Court, maintain that relief. I proceeded upon that with great reluctance in the late case of *Soden* v. *Soden*. A widow, entitled

* 120 to *elect between provisions by a will and a settlement, had not an opportunity of making an election; not knowing the value, and therefore not being bound, or to be considered as intending, to make an election. All the facts, charged by the bill, and the prayer, were calculated to call upon her to make an election; and I held that a declaration that she had elected, concluding her, could not be maintain-under the prayer of general relief; being inconsistent the case made by the bill, and the specific prayer that

she should make her election. But the relief now asked is according to the case made by the bill. There is no objection therefore to the decree upon that ground.

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*November* 20.

The only point upon which I deferred my judgment in this case is that of notice, which is of two sorts: actual notice, which must be proved as any other fact, and notice by construction of law; as, where notice to an agent is notice to the principal, if the agent comes to the knowledge of the fact while he is concerned for the principal, and in the course of the very transaction which becomes the subject of the suit.(*a*) The rule as to notice, arising from *lis pendens*, is a positive rule of law, made to prevent purchases of litigated titles. Another case is where the law imputes that notice which, from the nature of the transaction, every person of ordinary prudence must necessarily have. In the case of *Hill* v. *Simpson*(*b*) there is a direct recognition of the principle, *which is laid down in many cases. In *Taylor* v. *Hibbert*(*a*) Lord *Rosslyn* states it thus: "I have no "difficulty to lay down, and am well warranted by authori-"ty, and strongly founded in reason, that whoever purcha-"ses an estate from the owner, knowing it to be in the "possession of tenants, is bound to inquire into the estates "those tenants have. It has been determined that a pur-"chaser being told particular parts of the estate were in "possession of a tenant, without any information as to his "interest, and taking for granted it was only from year to "year, was bound by the lease that tenant had; which was "a surprise upon him. That was rightly determined; for "it was sufficient to put the purchaser upon inquiry that "he was informed the estate was not in the actual posses-"sion of the person with whom he contracted; that he "could not transfer the ownership and possession at the "same time; that there were interests, as to the extent "and terms of which it was his duty to inquire."

Notice actual or constructive, as to an agent: which must be while concerned for the principal, and in the course of the transaction which is the subject of the suit.

Notice to a purchaser of possession by a tenant, is notice of his interest.

Notice implied from the nature of the transaction.

(*a*) *Fitz*. 211. cited 3 *Atk*. 294. *Fitzgerald* v. *Lord Fauconberg*. *Lowther* v. *Carlton*, 2 *Atk*. 242. *Worsley* v. *The Earl of Scarborough*, 3 *Atk*. 392.

(*b*) *Ante*, vol. 7 p. 152. See 168. 170.

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(*a*) *Ante*, vol. 2. p. 437. See 440.

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The same principle is laid down in *Ferrars* v. *Cherry*:(b) and the reason is, that the titles of other men ought not to be shaken by creating a title, vested in a third person through his own folly. The settlement after marriage did not recite the previous agreement: but it was held, that the party ought to have gone to the wife's relations.

(b) 2 *Vern* 384.

No comparison can be made between these cases and the case now before the Court, with respect to the strength
* 122 with which the principle applies. I repeat, *that land is held not by possession, but by title: not so as to personal chattels; for the common traffic of the world could not go on. Therefore a sale in market overt changes the property of a chattel; and that rule, that possession is the criterion of title to a chattel, has been adopted in the bankrupt acts:(a) so that, if the owner has permitted the bankrupt to be the visible proprietor, the property is divested; for no one can distinguish the property except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *prima facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title; and if, being asked for the deeds, he acknowledges he has not got them, the purchaser is bound to farther inquiry.

Possession the criterion of title to a personal chattel. The property therefore changed by sale in market overt. That rule adopted by the bankrupt law. Distinction as to land; possession not even *prima facie* evidence

(a) Stat. 21 *Jac* I. c. 19. s 11.

In this case, *Arnold*, apprised that this plaintiff has got the title-deeds of *Mill's* estate, does not choose to go to the plaintiff to inquire whether he has a claim upon it, but purchases the estate from *Mill* by collusion; but suppose it merely negligence. So much is the equitable title from the possession of the deeds recognized even at law, that if a man having made the deposit previously, makes a title accordingly, only two minutes before he absconds, it is a legal title, and cannot be impeached; for though the legal act was done in contemplation of bankruptcy, it is protected by the previous equitable title; being only effect given to a title, created not in contemplation

Legal title in contemplation of bankruptcy protected by the previous equitable title.

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of bankruptcy, and except in form complete by the deposit.(b) Therefore, *though I should make the decree against *Arnold*, even without an issue, upon the evidence of the *res gistæ*, notwithstanding the denial in his answer, I rather choose to decide upon this clear principle of law. Therefore an account must be taken of what is due to the plaintiff by *Mill*, to be paid by *Arnold*, who has an election to keep the estate and pay the money.

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## RIDER *against* KIDDER.

*Nov.* 21.

Order for a transfer of stock, within the Stat. 36 *Geo.* III c. 90 as upon a refusal by a party, appearing by counsel, and admitting, that she had disobeyed an order to transfer.

BY the order pronounced in this cause(a) in *March*, 1806, the defendant was ordered to transfer the stock; and it was ordered, that service upon the clerk in Court should be good service. An application was made by motion under the late act of Parliament,(b) for a transfer upon the ground supported by affidavit, that repeated applications had been in vain; that the defendant cannot be found; her solicitor stating, that she is resident in *Scotland*.

The *Attorney-General* and Mr. *Phillimore* appeared for the defendant; and admitted, that she had not made the transfer.

The *Solicitor-General*, in support of the motion, said, this was a stronger case than those specified in the act: the defendant being under an order to transfer; admitting in Court, that she has not complied with that order; not stating any objection to it; and not being amenable to process. Under these circumstances *she must be considered as within the description of the act refusing to transfer; and a reference is not necessary. * 124

(b) That the equitable lien by possession of deeds is disapproved, and not to be extended, see *Norris* v *Wilkinson*, *ante*, vol. 12 p. 192 and the references in note(a), p 197

(a) Reported, *ante*, vol 10. p 360. vol 12 p 202.

(b) Statute 36 *Geo.* III. c. 90. See *ante*, vol 3 p 25

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Rider v. Kidder.

The Lord CHANCELLOR.

When the party appears by counsel, and admits that she has not obeyed an order to transfer the stock, made so long ago as last *March*, it is too much to say she does not refuse. What is a refusal, if that is not? Under these circumstances the order may be made under the act without a reference.

The order was made accordingly.

## EX PARTE ARROWSMITH.

*Nov. 5. 22.*

Order in bankruptcy for taxation of a solicitor's bill for business done in bankruptcy and otherwise.

THIS petition was presented under a commission of bankruptcy by a creditor, not the petitioning creditor; praying an order to tax the bills of a solicitor for business done for the petitioner under the commission, and other business.

Mr. *Hall*, in support of the petition.

Your Lordship has jurisdiction to order the taxation of these bills either under the act of parliament,(*a*) or by the general authority over solicitors. The words of the act are very large: "At law or in equity." Business done in bankruptcy, is both at law and in equity; the Lord Chancellor in bankruptcy exercising both jurisdictions.

(*a*) Stat. 2 *Geo.* II. c. 23. s. 22.

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*But this point has been decided in *Ex parte Smith*,(*a*) in which costs were incurred merely by striking the docket, the commission not having issued; and it was held that the Lord Chancellor sitting in bankruptcy, had authority to make the order for taxation. That decision was followed upon full consideration by Lord *Eldon*; sitting, not

(*a*) *Ante*, vol. 5. p. 706.

in bankruptcy, nor in any suit, but merely as Lord Chancellor, in *Ex parte the Earl of Uxbridge*.(b)

Mr. *Wetherell* against the petition objected, that two of these bills were old bills; which had been ratified by acts, and the right of taxation waived.

(a) *Ante*, vol. 6. p. 425.

The Lord CHANCELLOR observed, that the jurisdiction to tax the bills of attorneys and solicitors, as officers of the Courts, subsisted long before the statute,(c) and had been adopted in bankruptcy, and made the order.

(c) *Stat.* 2 *Geo.* III. c. 23. s. 22.

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## AUSTEN *against* HALSEY.

## BEDFORD *against* HALSEY.

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*November* 19. 24.

Construction of a will, giving the real and personal estate to the testator's son, his heirs, executors, &c. when he shall attain 21, or marry before that age with consent: in case of his marriage under that age, without consent, the real estate to be conveyed to him and his children in strict settlement; remainder to the daughters, and a subsequent limitation of the personal estate to the daughters, in case the son should not attain 21, or marry before that age with consent; that the son having married under 21 without consent, attaining that age became absolutely entitled to the personal estate.

ROBERT AUSTEN, by his will, dated the 26th of *November*, 1796, among other legacies, gave to his children *Frances* and *Elizabeth* the sum of 3,000*l.* *a-piece, in case they attain their respective ages of 21 years; but if either should die before she should attain her age of 21 years, he directed that the legacy of her so dying should go to the survivor; but, if both should die before that age, then the whole should lapse, and be wholly and absolutely void. He desired his trustees to pay and allow such sum as they, in their discretion, should think proper or necessary, for and towards the maintenance and education of his children, out of the rents and profits, interest, and dividends, of his real and personal estate. He gave, devised, and bequeathed, all and every his manors, messuages, lands, tenements, tithes and hereditaments, freehold, copyhold, and leasehold, (not in settlement,) and over which he had any power

of disposition, and not therein before disposed of, and also the reversion in fee of his estates in *Surrey*, which are in settlement, and also all and every part of his personal estate of what nature or kind soever, not thereby before disposed of, (except his large diamond ring, his books, manuscripts, pictures, drawings, medals, and coins,) to trustees, their heirs, executors and administrators, in trust to convey and assign the same real and personal estates respectively, and all the savings and increase, unto his son *Henry Edmund Austen*, his heirs, executors, and administrators for ever, when and so soon as he should attain his age of 21 years, or marry before that age, by and with the previous consent and approbation of his guardian or guardians, or the major part of them then living: but in case he should marry before that age without such consent, the testator directed his said trustees immediately on such marriage, to convey, settle, and assure, all and every part of his said freehold and copyhold estates to the use and behoof of his said son for his life; with remainder to trustees to preserve contingent remainders: remainder to his first and other sons, and in default of such issue to his daughters, *successively in tail general; and in default of such issue, or if his said son should die under the age of 21, without having been married, then in trust to convey all the testator's freehold and copyhold estates to his daughter *Frances*, her heirs and assigns for ever, in case she should attain the age of 23 years, or marry before that time with such consent as aforesaid of her guardians or the major part of them then living: but if she should marry before that age without such consent, then he directed his trustees immediately on such said marriage, to convey, &c. to the use of *Frances* for life, with similar remainders to her sons and daughters, as before limited with respect to his son; and in default of such issue, or in case she should die under the age of twenty-three years, without having been married, then, with similar remainders to the testator's daughter *Elizabeth* and her issue; and in default of such issue, or in case she should die under the age of twenty-three years without

having been married, then to the use of *William Bray*, his heirs and assigns for ever.

The testator then, in case his said son "should not "attain the age of 21 years, or marry before that age, with "such consent and approbation as aforesaid," directed his trustees to convey and make over his said leasehold estates and all and every other part of his personal estate above devised to them, together with all the savings and accumulations, that should be made from the produce of his real and personal estates, as aforesaid, after the payment of legacies, and the purchase-money after directed, to his daughters in equal shares and proportions: each such share to be an interest vested in, and divided and delivered to them respectively, when and so soon as they should respectively, attain the age of 23 years, or marry *before that time with the previous consent of their guardian, &c. but if either of them should die before 23 years of age, or marry before that age without such consent, then he gave her part or share to her sister, if she should attain the age of 23 years, or marry under that age with such consent and approbation as aforesaid; and if neither of them attain the age of 23 years, or marry under that age with such consent, &c. then he gave both such parts or shares to such grandchildren of him by either of his daughters; or, if there should be no such grand-child, to the person or persons, who should at the death of the survivor be entitled to the possession of his real estates under the will.

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The will then taking notice, that certain estates in *Surrey*, settled previously to the testator's marriage, would descend to his daughters, as tenants in common, in failure of his issue male, in case his son should die under the age of 21, without leaving issue, and both his daughters should be then living, gave to *Elizabeth*, or in case of her death under 21, to the person or persons entitled to her share in his settled estates, the sum of 2,000*l.* over

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and above the value of the share in the settled estates, on conveying such share to *Frances*, to be settled to such uses, or such of them as should be then capable of taking effect as above declared of his unsettled estates; and, he directed that his trustees should purchase *Elizabeth's* share of the estates in settlement; and, that the purchase-money should be paid out of the trust monies then in the hands of his trustees under the trust aforesaid, and that they should place out all the savings arising, or to arise from the rents, issues, and produce, of his said real and personal estate, until his son, or eldest or only daughter, or some other person, should be entitled to a conveyance and assignment and delivery thereof by the directions aforesaid, on mortgage.

* 129 *The testator then directed that his diamond ring, and all his books, manuscripts, pictures, drawings, medals, and coins, should be considered as heir-looms, and go with his mansion-house at *Shalford* to his children and their issue, in manner before limited: provided, that no person taking an estate tail by purchase in the real estate under the limitations, should be entitled to the absolute interest unless he or she should attain 21, or die under that age, leaving issue: but if all his children should die without issue, as aforesaid, then he gave his said ring, printed books, pictures, and drawings, to *William Bray*, and all his manuscripts, books, medals, and coins, with a few exceptions, to the *British* Museum. He committed the guardianship of his children, until their respective ages of 21, to his trustees; whom he appointed his executors.

The testator at his death left issue his son and two daughters, mentioned in the will, all infants.

The bill, filed on behalf of the two infant daughters of the testator, prayed that the will may be established, and the trusts carried into execution; that the accounts may be taken and the plaintiffs' legacies paid; and that, in case the

personal estate should be insufficient, the deficiency may be supplied out of the rents and profits, interests and dividends, of the real and personal estate, and the savings and accumulation to arise, until the defendant, *Henry Edmund Austen*, shall be entitled to the possession according to the will; and in case all the said funds shall be insufficient, then that the real estates may be declared well charged with the legacies, and that they may be raised out of the real estates.

*The other bill was filed by *John Bedford*, who had married *Frances Ann*, one of the daughters of the testator, and her sister *Elizabeth;* stating that *Elizabeth* had attained the age of 21; and that the defendant, *Henry Edmund Austen*, attained the age of 21 on the 20th of *May*, 1806, and in *October*, 1805, married without the previous consent and approbation of his guardians; and praying that a proper settlement may be made of the freehold and copyhold estates, according to the directions of the will; and that the rights and interests which the plaintiffs have acquired in the personal estate, and in the savings and accumulations which have been made from the produce of the real and personal estate, in consequence of the marriage of the defendant, *Henry Edmund Austen*, under the age of 21 without consent, may be declared. * 130

The causes came on for farther directions.

The *Attorney-General*, for the plaintiffs, contended, that according to the only disposition of the personal estate by this will, and upon the event of the son's marriage under the age of 21 without consent, the personal estate was given to the daughters, at the times, and subject to the contingencies, expressed; or, if not, it was undisposed of: nothing being intended to go to the son in the event that happened.

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The decree was pronounced; declaring that the son, attaining the age of 21, became absolutely entitled to the personal estate.

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November 25.

## *CLIFFORD *against* BROOKE.

Bill not sustained upon the ground of fraud or mistake the relief being in the nature of damages, the subject of an action, and the charges of fraud not being proved, the bill was dismissed with costs.

THE case, as it appeared upon this bill, was, that the plaintiff was induced by a wilful and fraudulent misrepresentation by the defendant, of the flourishing state of a partnership concern in which he was engaged, to advance the sum of 3,625*l.* in order to enable his brother to become a partner, which sum the plaintiff permitted to remain, as part of the capital of his brother, upon the security of his bond. Articles were executed accordingly, dated the 31st of *August*, 1795. In 1797 the defendant retired from the business; and in 1801 the partnership became bankrupt. The bill charged that the concern was insolvent at the time of, and long before, the transaction with the plaintiff, to the knowledge of the defendant: and that the whole transaction was the result of a fraud and imposition, contrived by the defendant, to enable himself to withdraw. Among other particular instances of fraud the plaintiff charged that the defendant bribed the clerks to shew a false balance-sheet to the plaintiff and his brother. The prayer of the bill was a declaration that the defendant ought to make satisfaction to the plaintiff for the loss incurred by him, in consequence of the fraud and imposition practised by the defendant, whereby the plaintiff was induced to advance the sum of 3,625*l.* for the benefit of the partnership.

The Lord CHANCELLOR, when the case was opened, put it upon the plaintiff's counsel to shew that the Court ought

to hear the evidence; suggesting that this was a case for an action.

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Clifford v. Brooke.

*Mr. *Alexander*, Mr. *Fonblanque*, and Mr. *Huddleston*, for the plaintiff, relied on the case of *Evans* v. *Bicknell*;(a) and contended, that, if the charges of fraud were not supported by evidence, the bill might be sustained upon the ground of mistake.

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(a) *Ante*, vol. 6 p. 174 See p. 178.

The Lord CHANCELLOR.

If in dismissing this bill I were to exclude the plaintiff from all remedy, I should pause upon the decision. Though I do not mean to cripple the jurisdiction of this Court, yet, if the evidence came up to the charges, so as to entitle me to act upon them, I doubt extremely whether I ought to make such a decree; for this case answers the description given by Mr. *Richards* of the case of *Evans* v. *Bicknell*; viz. merely an action for money. I do not think that case was of that description, and I agree with the admirable judgment pronounced by Lord *Eldon*; for the defendant in that cause was a trustee, who, under very particular circumstances, permitted the title-deeds to go out of his possession: and the mortgagee was defrauded. There is no doubt the Court was entitled to do what was prayed by that bill. The defendant did not mean to defraud the plaintiff. But, if evidence had been produced that he parted with the deeds for the purpose of defrauding any one, Lord *Bacon's* maxim would apply to such a case of fraud, intended against one person, taking effect upon another; which principle prevails also in trespass and the criminal law; as in the case(b) of a squib, by which, having passed through several hands, a person lost an eye; and the person who first threw it, as the original wrong-doer, was held *answerable in trespass: so, a stone being thrown in a street, where many people are passing, which does not hit the per-

Relief against fraud, intended against one person, taking effect upon another; and the same principle prevails in trespass and criminal cases

(b) See *Scott* v. *Shepherd*, 2 *Black*. 892.

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1806. Clifford v. Brooke.

son at whom it was thrown, but kills another, against whom it is not directed.

But in *Evans* v. *Bicknell*,(a) Lord *Eldon* appears to have felt considerable doubt, whether the parties should not be sent to law. If this is a fraud, is not the plaintiff entitled to an action upon the case, upon the principle of *Pasley* v. *Freeman*?(b) With regard to that case a considerable difference of opinion prevails; and some of the most correct judgments appear to me to have been surprised. My opinion upon this species of action does not concur with that of Lord *Eldon*, as expressed in the case of *Evans* v. *Bicknell;* which opinion, against that action, I know his Lordship constantly held in the Court of Common Pleas. The mistake of those who invade the principle of that action, consists in this. The proposition is not, that if a man asked, whether a third person may be trusted, answers, "You "may trust him: he is a very honest man, and worthy of "trust," an action will lie, if he proves otherwise. There must be the knowledge at the time.(c) That is the sound principle, that the defendant, knowing that person to be dishonest, insolvent, and unworthy of trust, made the representation; and that is the subject of an action, or of a bill in equity; where it is necessary and fit that equity should interpose the concurrent jurisdiction; as the law cannot give so speedy and effectual relief; the Court of

* 134 Equity *exercising a discretion, whether it will interfere, though relief may be had at law. As to the danger from a single witness, is not that sufficient for conviction of a capital crime? That objection goes to the very root of the law, which is uniform in principle and practice, with the single exception of the case of perjury, as there is oath against oath.(a) That case of *Pasley* v. *Freeman*(b) therefore stands upon the clearest principles of jurisprudence;

(a) *Ante*, vol. 6. p. 174.

Action upon damage from a wilful, fraudulent, misrepresentation; tho' by a person having no privity.

Concurrent jurisdiction in equity; where the law cannot give so speedy and effectual relief.

Distinction of perjury; requiring two witnesses.

Undertaking for the debt of another within the statute of frauds.

(b) 3 *Term Rep.* 51.

(c) The Lord Chancellor throughout the judgment in *Evans* v. *Bicknell*, considers the action in *Pasley* v. *Freeman* as maintained upon the ground of fraud and deceit in the defendant, and damage to the plaintiff. See particularly page 182.

(a) 10 *Mod.* 194, 195. (b) 3 *Term Rep.* 51.

and has no connexion with the statute of frauds,(c) which applies, where one man undertakes for the debt of another. 1806. Clifford v. Brooke.

I agree, the case of *Haycroft* v. *Creasey*(d) is not within the principle. That case resembles this: a probable fraud; but not evidence sufficient to support an action of that kind; which must stand upon plain, clear, fraud and deception, proved to the satisfaction of a Jury. If this were a case for relief, there is no want of privity.

(c) Stat 29 Car. II. c 3.
(d) 2 *East*, 92.

The law gives relief in all these cases of fraud; as in the case of *Cousins*, a sugar-baker, who endeavouring to prop up some persons engaged in that trade, contracted to buy a judgment; stipulating however for an undertaking, that there was no debt upon which a commission of bankruptcy could be taken out. That undertaking was given, but under a bill filed, charging that those who gave it knew at the time, that there was a petitioning creditor's debt, an issue was directed, which was twice tried, and the fraud was established by the verdict. I do not say, there are not many cases in which a Court of Equity ought to *give relief, and the case of *Evans* v. *Bicknell*(a) is one instance. But this is not that sort of case, upon the evidence, and, if I am mistaken as to the effect of it, the plaintiff may bring an action. There are cases certainly of mistake that upon that ground, this Court would not compel the specific execution of a contract;(b) but, where the party can have an action, I will not give this relief upon that ground. * 135

(a) *Ante*, vol. 6. p 174.

Specific performance refused upon mistake.

The *Solicitor-General*, for the defendant, pressed for costs, on account of the particular charges of fraud, which were not supported by evidence, and the bill was, on that ground, dismissed with costs.

(b) *The Marquis of Townshend* v. *Stangroom*, *ante*. vol. 6. p. 328. *Mortlock* v. *Buller*, *ante*, vol. 10. p. 292.

1806.

November 26.

## BANNER *against* LOWE.

Apportionment of interest upon a bond according to the general rule, as accruing *de die in diem*, not as dividend, or rent, not provided for by the statute, is not prevented by the condition, reserving it by equal half-yearly payments

THIS cause coming on for farther directions, a question was made, whether the interest upon a bond debt was to be apportioned. The bond was taken by the testator for 9,000*l.* the consideration for the sale of an estate; the condition reserving the interest to himself and his wife jointly, to be paid by equal half-yearly payments.

Mr. *Fonblanque*, for the administrator of the testator's widow, a defendant, claimed an apportionment of the interest of the bond, as accruing, *de die in diem*.

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Mr. *Richards* and Mr. *Alexander*, for the residuary legatees, distinguished this from the common case of *apportionment by the particular times of payment, specified by the condition; comparing it to the case of money in the funds, and rent not provided for by the act of Parliament,(*a*) as not being due *de die in diem*.

(*a*) Stat. 11 Geo. II. c. 19. s. 15.

The Lord CHANCELLOR.

Upon this subject of apportionment the Legislature was forced to interfere in the instance of rent, and equity has provided for other cases. I shall not consider this as taken out of the general rule upon so nice a distinction. This condition is expressed as in every mortgage and money bond.

The apportionment was therefore directed. Mr. *Fonblanque* mentioned the case of *Edwards* v. *The Countess of Warwick*.(*b*)

(*b*) 2 *P. Wms.* 171. See page 176.

## WRIGHT *against* PROUD.

*November* 24, 25, 26.

Deed set aside, as obtained by fraud, and undue influence by a keeper of a house for lunatics from a person under his care; as within the general principle arising from the relation of guardian and ward, attorney and client, &c.

THE object of this bill was to set aside a deed as having been obtained by fraud, and under undue influence from the plaintiff and *Lapworth Mills*, deceased, by the defendants. The effect of the deed as to *Mills*, was a conveyance of his whole property in favour of the defendant *Proud*, and his daughter; *Proud* being at the time the keeper of a house for the reception of lunatics, in which *Mills* was for many years a patient, having been in that unhappy situation from his childhood: but, according to the representation of the defendants, he had recovered, and was at the time the transaction took place resident in the house, not as a patient, but as a boarder, from choice; and, proposed *in this way to remunerate the kindness, with which he had been treated. With respect to the plaintiff, the deed was impeached as a direct fraud, under the circumstances, being prepared by the defendant's attorney; the plaintiff's interest being falsely recited, either by fraud or mistake, and the effect being to make him purchase what was his own already. * 137

The *Solicitor-General*, and Mr. *Hart*, for the plaintiffs, insisted upon the particular circumstances of this case, appearing in evidence, and upon the face of the deed, as establishing that it was improperly obtained; but chiefly relied upon the general principle, that a Court of Equity would not permit a deed, made under such circumstances, in favour of the keeper of a mad-house, to stand; admitting that no such case could be produced, but insisting that the case of guardian and ward was much weaker; upon which point it has been held, that under no circumstances can a guardian take a conveyance from his ward, while the relation subsists, until the accounts are settled, and the ward is entirely removed from the influence of the guardian; though such a transaction, when the relation has

1806. Wright v. Proud.

completely ceased, all accounts settled, and no controul subsisting, may stand. This has been carried so far, that a conveyance to a brother by an orphan, living with him as one of his family, though no particular fraud appeared, was set aside upon the relation enabling him to exert an undue influence.(b)

(b) *Griffin* v *De Veuile*, 3 *Wood.* App. 16 3 *P.Wms* 131 Mr *Cox's* note.

Mr. *Alexander*, Mr. *Fonblanque*, and Mr. *Lewis*, for the defendants.

* 138 *The Lord CHANCELLOR.

Transaction appearing to have grown out of the influence from the relation of guardian and ward, set aside; though all accounts had been settled, and the relation had ceased.

The principle upon which a transaction is set aside upon the relation between the parties, as between guardian and ward, has been extended to the case where all accounts were previously settled, and the connexion was at an end; the transaction appearing to have grown out of the influence arising from the relation.

Independent of fraud an attorney shall not take a gift from his client, while the relation subsists.

In Lady *Sanderson's* case(a) all these cases were considered; and Lord *Hardwicke* would not permit the transaction to stand, even after the relation had ceased, as it took place under undue influence. So, independent of all fraud, an attorney shall not take a gift from his client while the relation subsists, though the transaction may be, not only free from fraud, but, the most moral in its nature. The judgment in *Wells* v. *Middleton*(b) went wholly beside any thing that could affect moral character.

This case appears under very remarkable circumstances. Suppose this person not to have been a patient in the house, but at large, and capable of transacting his own affairs; yet, employing an attorney recommended by the person who was to take the benefit of the transaction, that attorney receiving the deeds, taking them with him for inspection,

(a) Cited *ante*, vol 12. p. 372. in *Morse* v *Royal*.
(b) Cited *ante*, vol. 9. p. 294. in *Hatch* v. *Hatch*, vol. 12. p. 372. in *Morse* v. *Royal*.

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and then making this deed, reciting, that this plaintiff took an interest quite different, and much less than he had a right to enjoy, if there were no more in the case, the transaction *could not have stood against this plaintiff; who was clearly overreached himself, and was made the instrument of overreaching another in the course of the same transaction. * 139

But upon the other ground it is impossible to permit this transaction to stand. Upon the evidence, this person was from his birth of a diseased intellect, and attempted to destroy himself when a boy. He was carried to the house of the defendant, and was, I believe, kindly treated. If he had been a man who could go out of the house when he pleased, and deal with his own property as he pleased; if he had remained there as a patient instead of a boarder, this gift could not have stood a moment. Then what is the effect of the deed? It places him in the condition of an absolute lunatic. It shews him to be in that situation in which, if he was placed in it by the evidence, the deed could not stand an instant. The moment the deed was executed he was subject to the controul of the house, much more than if he was there from the effect of indisposition; as in that case, if he should recover, he would be delivered from that situation. But under these circumstançes he could not be delivered, his property being transferred to these persons; not even a life-rent remaining to him. He seems to have been sensible of the kindness of this family, which he proposed to remunerate; but what he proposed, according to the evidence, was to remunerate them at his death. But the effect of this deed was, that he was in the condition of a lunatic: his income, upon the declaration of the defendant, to be doled out to him; and he was to be fed and cloathed as they pleased. This deed must therefore be declared fraudulent and void.

1806.

November 25. 27.

In the case of pedigree hearsay evidence of declarations by the husband as to his wife's legitimacy admissible, as well as those of relations by blood

Upon pedigree slight evidence sufficient ; as reputation, and a forgery established, is not decisive ; but weighs considerably against the party producing it.

## *VOWLES *against* YOUNG.

AN issue having been directed under a bill of redemption, the plaintiffs claiming as co-heirs at law, upon the trial before Baron *Graham*, at the Assises, a verdict was found for the plaintiff.

A motion was made for a new trial, upon two grounds: 1st. That the Judge had improperly rejected the evidence of *Thomas Roberts*; that he had heard *Samuel Noble*, the husband of *Mary Noble*, say, she was illegitimate: 2dly. That the evidence produced by the plaintiffs, one part of which, an entry in a register, was admitted to be a forgery throughout, was not sufficient to sustain the verdict.

The *Solicitor-General* and Mr. *Hart*, in support of the motion, observed, that the first point was a question rather of construction than of law: viz. whether the husband is to be considered for this purpose as a part of the wife's family; and contended that as the declarations of any person connected with the family of the person from whom the pedigree is deduced, are clearly to be admitted, declarations by the husband ought to be received in preference to those of a first or second cousin.

Upon the second point.—This is not a mere trial of a fact, but an issue, directed to satisfy the conscience of the Court; who will not be satisfied by a verdict with very slight evidence on one side, and none on the other. The plaintiffs cannot determine that they will not again produce

* 141 the forged register. All *the evidence material to the issue ought to be produced; and, upon a new trial, the Court may order them to produce it, as in the late case of *Pemberton* v. *Pemberton*, upon an issue, "*devastavit vel non*," a witness, produced by the heirs at law, proved a great deal

against them; and upon the application for a new trial, they were ordered to produce that witness again.

Serjeant *Lens*, Mr. *Richards*, Mr. *Burrough*, and Mr. *Heald*, in support of the verdict.

The general rule, that declarations by any person connected with the family are to be received, is admitted. But the effect of the guarded manner in which the question was put to this witness upon the trial, is, that the husband must be considered as a mere stranger; and therefore within the rule, as laid down by Lord *Kenyon*, and always acted upon, that declarations by a mere stranger to the family cannot be received. When this question was asked, it was put to the counsel to say whether they intended to follow it up by another question, whether the husband had his information from his wife during the coverture; and as they declined to put that question, the evidence is reduced to the declaration of a stranger. The ground of the exception to the general rule against admitting hearsay evidence is convenience; for the purpose of proving pedigrees by the declarations of persons connected as different branches of the same family. If a husband cannot be personally examined for or against his wife, why should any declaration by him be received for the purpose of bastardizing her? the question put to this witness was general; whether he had ever heard this declaration from the husband; not confining it to the period of coverture.

*The *Solicitor-General*, in reply. * 142

The foundation of this evidence is tradition, collected from declarations at different times as to the fact of legitimacy, by a person a part of the family. The possibility that the declaration might have been made after the coverture had ceased, forms no objection; credit being given to the declaration on the ground that the information was received while the relation subsisted. If the husband had

1806. Vowles v. Young.

left his family, and gone to a foreign country, evidence of his declaration, subsequent to that time, would be received. The governing principle is, that the exact period, when the information was received, cannot be ascertained. The rule, that a husband and wife cannot give evidence for or against each other, cannot apply after the death of the wife. The principle of that rule is the interest either of them must feel in favour of the interest of the other; or the danger of discord in the family, if either is produced against the interest of the other. Consider the extent of that objection. It would reach the husband himself, if produced personally as a witness to prove the declarations of his wife, or her father. The attempt to distinguish the husband from the family, for this purpose, was never before made; and is most unreasonable. Evidence of declarations by a woman, that her third cousins, once removed, were her nearest kin, have been admitted; and can the husband's declarations as to the legitimacy of his wife be refused: a point certainly of some importance to him, if the stigma is considered? This evidence, therefore, must be received; especially in such a case; a woman having very little property, merely this equity of redemption.

* 143 *The Lord CHANCELLOR.

Two questions arise upon this application for a new trial: 1st. Whether *Roberts* ought to have been received to say that he had heard *Samuel Noble* declare his wife, *Mary Noble*, was illegitimate: 2dly. If the Judge was right in rejecting that evidence, the only point being as to her legitimacy, whether there was evidence sufficient to sustain the verdict in favour of her.

The first of these questions is certainly of very considerable moment. Courts of Law are obliged in cases of this kind to depart from the ordinary rules of evidence; as it would be impossible to establish descents according to the

strict rules by which contracts are established, and subjects of property regulated; requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence: the best the nature of the subject will admit; establishing the descent from the only sources that can be had. Perhaps, while the feudal tenures prevailed with the ancient inquisitions, as inquisitions *post mortem*, opportunities of establishing descents were afforded, much superior even to the modern means by the register of births and baptisms. The heads of families upon those occasions made solemn declarations, which were matter of record, and threw a great light upon questions of inheritance.

Evidence of pedigree by declarations of heads of families upon inquisitions *post mortem*.

If the declaration of the husband is not to be received to prove the legitimacy or illegitimacy of his wife, as a distant relation might, which seems to be contended, the extent of that proposition must be considered. Suppose the question were, whether she was the daughter of *A.* or *B.*; his evidence might equally *be rejected upon the question, whether she descended from one stock or another; yet, as far as hearsay is evidence of any thing within the knowledge of a man, no man can be supposed ignorant of the reputation of the descent of his wife; and, the law, admitting probability upon such a subject, always receives reputation of descent. It is not necessary to trace her from her birth. If the reputation of descent is evidence, and it may be established by a relation, however distant, the subject deserves consideration with reference to the person who has the best means of knowing the fact. I admit the rule of evidence, and the reason of it, as between husband and wife. They are considered as one person; and the very foundation of society would be shaken if that exception had not been made. But it must be considered whether that can extend to mere collateral declarations of this kind, where there is no interest in the husband. The objection must go the length of extinguishing the husband's evidence altogether, up to the point I mentioned, whether the wife

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Husband and wife cannot give evidence for or against each other.

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descended from one stock or another; though the husband must be supposed to have a more intimate knowledge upon that subject than a distant relation.

Inscriptions upon tombstones, and engravings on rings, evidence of pedigree.

Upon questions of pedigree, inscriptions upon tombstones are admitted; as, it must be supposed, the relations of the family would not permit an inscription without foundation to remain. So, engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it. I take this question with the qualification that has been stated; not, whether the husband had heard the fact from any of his wife's relations, but, whether he knew it: viz. whether he had such knowledge as is necessary to establish that kind of fact.

* 145 *The second question contains nothing new; and, except from one circumstance, my opinion would be in favour of the plaintiffs. Upon the rule, "*stabit presumptio donec* "*probetur in contrarium*," actual marriage being proved, reputation is sufficient: legitimacy is to be presumed; and the proof thrown on the other side. The evidence, especially in the case of obscure families, must be very slight; for, if the party is legitimate, the question is never made: nothing is said upon it. If this register, therefore, was out of the question, the evidence would have been sufficient; otherwise the proof of such facts would be extremely difficult. But, with reference to the circumstance, to which I have alluded, Lord *Mansfield* had this subject under his consideration; and different opinions have been given upon the point.

Two cases have occurred in the House of Lords. In the *Douglas* cause every branch of the written evidence that went to establish the descent of Lady *Jane Douglas* was known to be manufactured by Sir *John Stuart*; who, having neglected to secure evidence of birth, had recourse to those feigned letters, as they were called, in support of his son's legitimacy; and that was considered, both by

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Lord *Mansfield* and Lord *Camden*, as not throwing any obstacle in the way. In the more recent case of Lord *Anglesea* there was the certificate of the marriage; and the hand of the clergyman was proved. Lord *Anglesea* lived with the lady; and, upon his death-bed, receiving the sacrament, as well as at other times, declared he was so married; and Lord *Valentia* was the legitimate son of that marriage. When that case was before the House of Lords, a similar suspicion of forgery arose, as in this instance, that the eye could detect; but not, as in this instance, a forgery of the whole entry, interpolated: the clergyman's hand being established in that case; and the suspicion *fell only upon * 146 the signature of one of the two witnesses. Lord *Mansfield* said, truth does not require the aid of forgery: if the marriage was real, they might have come forward with the evidence belonging to it; and judgment was given against Lord *Valentia*. These two great cases stand in opposition to each other. In the former an instance was cited by Lord *Mansfield* of a lady, who, being accused of the murder of her sister, desired time, and procured another to personate her; but, that being discovered, the person accused was executed, and afterwards her sister appeared.

The conclusion is, that it cannot be said, as a forgery appears, the fact is not to be established, swear it who will; as Lord *Mansfield* said in the latter of those two cases in the House of Lords. A rule is not to be laid down either way; but every case must depend upon its own circumstances. Forgery is always an object of suspicion, but the effect is not such that it may not be overborne by testimony. It seems to be admitted that this is a forgery. The Jury could not have been surprised; the Judge having mentioned his opinion that it was to weigh, and against the party producing it.

1806.

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November 26.

The Lord CHANCELLOR.

I continue of the opinion I expressed. In a case of pedigree, upon which remote and slight evidence must be allowed effect, had not this fabricated entry in the register appeared, I should have thought the evidence quite sufficient to support the plaintiff's case. The effect of that fabrication is for the consideration of the Jury, and my opinion is that the effect ought to be very strong.

* 147 *But upon the other part of the case, my opinion is, that the Judge has given too narrow a construction "to *the* "*family*" of the person whose descent or legitimacy is to be established. I have been concerned in many cases where it was necessary to deduce pedigrees from very remote times; particularly before the establishment of registers, when resort was had to inquisitions *post mortem*; and the consequence would have been most dangerous if the evidence of the head of the family had been excluded, which might cause a great chasm. The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relation or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says *A.* is his relation, without stating the particular degree, which perhaps he could not tell if asked. But it is evidence from the interest of that person in knowing the connexions of the family. Therefore the opinion of the neighbourhood, of what passed among acquaintance, will not do.

Hearsay of relations admitted to prove consanguinity, and without the correctness required upon other facts. The degree therefore is not required.

But, the principle being interest, the opinion of the neighbourhood will not do.

Consider, then, whether the knowledge of the husband, as to the legitimacy of his wife, is not likely to be more intimate, and his interest stronger, than that of any relation, however near in blood. First, if she has an estate tail, he is tenant by the curtesy. Has he not an interest in know-

ing her legitimacy; his expectation depending upon it? So, as to personal estate, he is entitled to all that comes to her. Is not that a strong interest? The honour of the husband and family are also connected with it. The principle, upon which this direction was given, that the husband is not be considered one of the family for this purpose, and cannot *speak as to her legitimacy, either for or against it, except by hearsay from one of the family, must determine also, that he could not be admitted to say whether she is of one family or another. I am very apprehensive of the consequences of that. What weight this evidence is to have is another consideration. The husband might be separated from her; or might wish to disparage her. How much or how little weight it ought to have will be the subject of consideration at the trial. Here we are upon the question, whether it is to be admitted, or not; and upon that point I think there must be a new trial. * 148

## CROSBIE *against* M'DOUAL.

*November* 26, 27.

Distinction between a mere voluntary promise, *nudum pactum*, that will not maintain an action, and a promise upon the faith of which another does some act; as entering into engagements or paying money, forming a consideration that will support an action, and therefore establish a debt against assets.

THE Master's report in this cause stated that the defendant, *Margaret Carmichael*, had brought before him a state of facts, and a charge, verified by the affidavits of *David Barclay*, *Stephen Riley*, and herself, stating that the testator, *William Crosbie*, by a codicil, dated the 29th of *May*, 1790, gave to her, by the name of Mrs. *Margaret Carr*, which she then used, an annuity of 300*l.* for her life, with a legacy of 1,000*l.*; and soon after he had executed that codicil informed her of his having made that bequest for her benefit; and, at the same time, expressed to her his determination of purchasing a house for her; declaring that the reason he did so was that she might have a house free of expense, without taking any thing from the annuity or legacy he had left her; because he did not think they would support her, as he could wish, without she had a house rent-free.

1806. Crosbie v. M'Doual.

*The Master also found, that after the testator had so expressed himself, he made it his business when in *London*, to look at different houses, and stated to the defendant the particulars, and his objections to the houses he had seen; and, not being able to find a house for the defendant to his satisfaction, in the beginning of *March*, 1795, he gave directions to *Stephen Riley*, his upholsterer, to look out for a house for her; who, at last informed the testator and Mrs. *Carmichael* of one in High-street *Mary-le-bone*. The testator with Mrs. *Carmichael*, went to see it; and, highly approving it, he gave *Riley* directions to treat, and after several conferences with the owner, the defendant *Carmichael* and the testator, respecting the terms, to the whole of which the testator was privy, *Riley* agreed for the purchase at the sum of 1,000*l.* The testator approved the price; but told *Riley* it would not be convenient for him to pay the whole money down, as he was then about buying a house for himself, and therefore *Riley* must agree for payment of part down, and the rest by instalments; in consequence of which *Riley* concluded the treaty; and being asked by the testator, if he had settled the business, informed him that he had agreed for the purchase, for 1,000*l.*: 200*l.* to be paid down, and the remaining 800*l.* by yearly instalments of 200*l.* each, until the whole was discharged; to which the testator replied, "that will suit me very "well."

The testator informed Mrs. *Carmichael* of the purchase, saying, he much approved the terms; and, that he had in consequence given directions to *Riley* to conclude it, and hoped, she also approved what had been done.

The Master farther found, that pursuant to the directions
* 150 of the testator an agreement, dated the 30th *of *March*, 1795, was prepared, between *Brown*, the owner of the house, and the defendant Mrs. *Carmichael*; which was made in her name by the particular desire of the testator; by which *Brown* agreed to sell the house to her for

1,000*l.*: 200*l.* to be paid down at the execution, and a mortgage to be made to *Brown* for the remaining 800*l.*: 200*l.* to be paid annually, with an option of paying off the whole within four years. That agreement was signed by the defendant *Margaret Carmichael*, and *Brown*, in the presence of *Riley*, who witnessed it; and, afterwards was shewn to the testator, who expressed his approbation, and gave *Margaret Carmichael* 200*l.* for the purpose of paying that sum to *Brown;* and which was accordingly paid to him; and, upon that payment possession was delivered. The testator desired Mrs. *Carmichael* to go to the house, and give directions for repairs and improvements; and he went himself, again looked over it, and gave directions for several additional improvements, and chose the paper, for the whole of which, as well as for the repairs ordered by Mrs. *Carmichael*, he paid before his decease. Besides the 200*l.* on executing the agreement, he paid the first and second instalments of the remaining 800*l.*, having previously desired Mrs. *Carmichael* to remind him at the time the next instalments became due, which she did, and in consequence thereof he gave her the money to pay them; and, previous to the second payment she wrote to him, who was then at *Portsmouth*, reminding him of it, and in answer by letter to her, dated the 25th of *June*, 1797, he wrote as follows:

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"In regard to the money for your house, I desire you "will write a note to Mr. *Brown*, and assure him he shall "have his 200*l.* before *Christmas*, for I will make a "point, that you shall have it, as I *wont let your credit * 151 "be called into question. You may tell him not to give "himself any further trouble about it, for he may get it "when he least expects it."

By another letter to Mrs. *Carmichael*, dated the 26th of *June*, the testator says, "Now remember you must send "to Mr. *Brown* to let him know, that to a certainty his "money will be paid before *Christmas*;" and in conse-

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quence of such determination the testator did pay such second instalment of 200*l.* to the defendant, *Margaret Carmichael*, before *Christmas*; which she paid to *Brown*.

By another letter, received by *Margaret Carmichael* from the testator, dated the 21st of *May*, 1798, he wrote thus: "Pray, when do you pay the other 200*l.* for your "house?" in answer to which, she by letter informed him, that it did not become due until *Christmas* next; but the testator died on the 16th of *June*, 1798.

The defendant, *Margaret Carmichael*, stated, that had not the testator promised, and engaged to purchase for her, and pay for the house, independent of any benefit he might intend her to take under his will, she would not on any account have entered into or concluded the treaty for the purchase; as, notwithstanding she was informed of the bequest to her, she was perfectly convinced she was not able to complete such purchase; nor would have thought it prudent to have engaged to pay for the house, even after the testator's decease, out of the property he had left her.

The Master farther found, by the affidavit of *Riley*, that
* 152 from the several interviews and conversations he *had at different times with the testator relative to the house, the deponent is perfectly satisfied, it was the testator's intention to pay for it, and to give it to *Margaret Carmichael*; and, that he held himself bound to complete the purchase; and would certainly have done so, if he had lived. The testator also repeatedly declared to *David Barclay*, a major in the army, in habits of intimacy with him for several years, that it was his intention to purchase a house for *Margaret Carmichael*; that she might have a comfortable dwelling in case of any accident happening to him; and Major *Barclay* in 1795, at the request of the testator, went with him, and looked at several houses with the intention, as expressed by the testator, of purchasing one for her; and some time afterwards he informed *Barclay*, he had

purchased for her a house in *High-street*, and he was to pay the price by instalments; and, that he meant to furnish the house for her; and from these and other circumstances, and from the great regard and esteem *Barclay* had repeatedly heard the testator express for *Margaret Carmichael*, *Barclay* stated his conviction of the testator's intention to leave her in the right and possession of a complete furnished house, unincumbered.

The Master certified, that he found from all the circumstances, that the purchase of this house for the benefit of Mrs. *Carmichael* was solely the purchase of the testator; and considering the purchase by the subsequent instalments as completely carried into effect, the two last instalments having been left unpaid at his death merely for his convenience, it appeared to the Master, that Mrs. *Carmichael* had in equity a right to have the purchase, so made for her benefit by the testator in his life, perfected by his representatives; as with respect to her the gift was completed in his life; *and could not be rendered incomplete by the accidental circumstance of his death, before the two last instalments became due. The Master therefore allowed the charge of 400*l.* * 153

To the report, as allowing that charge, an exception was taken.

The *Attorney-General* and Mr. *Leach*, in support of the exception.

Mrs. *Carmichael* cannot be considered as a creditor. The testator certainly had the intention to give her this house. She has had the benefit of so much of that intention as was executed during his life: but as to what remained unexecuted at his death, she could claim only under his will; if he meant to leave her the money which she had contracted to pay for the house. This transaction, as far as it went, was an act of pure benevolence by the testator. So much

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of the money as became due in his life was an actual gift by him. He would not himself enter into the contract for this house, but chose that the deeds should be between Mrs. *Carmichael* and the owner of the house; and that she should covenant in the mortgage-deed with him. Here is no contract between her and the testator, whence debt could arise; but mere intention to give, not completed by actual gift; though, probably, if he had lived, he would have completed it. As a creditor she must stand upon contract, which cannot arise out of disappointed expectation. This is a legal demand, if any; if not, a Court of Equity cannot say, as against the executors, that she has any claim. By giving effect to such a claim gift, pure benevolence, no valuable consideration passing, *which, if not perfected during the life of the donor, cannot be enforced, is confounded with contract. She might have declined to enter into this contract upon the terms required; a reliance on his future bounty. The utmost extent to which this can be carried, is a promise to pay this money for her: upon what consideration, constituting a legal debt against the assets; the consequence of her right of action against the testator during his life?—Whatever may have been the nature of the treaty in the commencement and progress, the conclusion was a contract between *Brown* and Mrs. *Carmichael*; which could not give *Brown* a right of action against the testator: nor could she by paying *Brown* acquire that right. The testator cannot be represented as having, by promising to pay the money, induced her to contract with *Brown*. The promise is merely voluntary; incapable, therefore, of sustaining an action.

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The *Solicitor-General*, for the report.

This exception stands upon a technical, legal, objection, against the clear humanity and justice of the case; and the conclusion of the report is right upon all the facts stated in it, that this was a debt in equity, which might have been enforced against the testator in his life, or against his assets

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after his death. The testator, in his will, calls this lady his friend; and makes an ample provision(a) for her son. The purchase of the house was, in truth, for his own residence, when he chose to go there; and the conclusion, drawn by the witnesses, as to his object, is confirmed by the facts stated in the report. He agreed to purchase this house for the purpose of giving it to her. She, *swears, she never would have entered into the engagements, and covenants, required for the purchase; that she had not the means of paying annually 200*l.*; and did not want the house. The testator, not choosing that his name should appear, desired her to take the conveyance, and to enter into engagements for the money. She did so, at his instance; not from her own desire, placing herself in circumstances that might have brought her to a jail. The argument, in a Court of Equity, is, that she made the purchase, and he lent her the money: the formal conveyance being made to her; and upon the foundation that the simple contract is merged in the covenant, a Court of Equity is desired to conclude against the truth of the transaction: a purchase by him; not choosing that his name should appear. If he had died immediately after the contract, must she have paid the whole? If that is right, why cannot the money, paid by the testator, be recovered? Suppose a man, the frequent guest of another, in the country, adjoining whose seat is a piece of ground that would add considerably to the beauty and enjoyment of the place, but an enormous price is asked; that the guest, attached to the place, desires his friend to contract for that piece of ground for him, and says he will pay for it; and the other contracts accordingly, and pays far beyond the value: would a Court of Equity permit that man to recede from his engagement? Would not that be considered a fraud, in respect of the consideration; an engagement contracted at the request of another, into which without that motive the party contracting would not have entered? Upon that view of this case the Master was perfectly right in considering this a demand in equity; though not at law. A Court of Equity has jurisdiction in all these

(a) A legacy of 4,000*l.*

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cases, which are considered the foundation of an equitable action; viz. for money had *and received, or paid, laid out and expended, for the use of another; the principles of which action apply to this case.

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The *Attorney-General*, in reply.

Though to a certain time *Riley* may have been employed as the agent of the testator, the formal contract was between *Brown* and Mrs. *Carmichael*; and the Court can look only at the written agreement. *Brown* could not have resorted to the testator for payment of the instalments. The only remedy was under her covenants. Neither could she have maintained an action against the testator. The answer to an action would have been the statute of frauds.(a) She must be taken to have purchased this house for herself, upon the expectation, fulfilled to a certain extent, that he would pay for it. What was paid by the testator during his life, being gift, could not, upon any principle, be recovered. But the consideration, whether what was not gift, perfected in his life, can now be recovered from his assets, is very different. The case last put would be in direct opposition to the statute of frauds. A Court of Equity could not act upon such a ground. Admitting that Mrs. *Carmichael* would not have made this purchase if the testator had not promised the money, the case is not helped, for a voluntary promise, to enable another to make a purchase, cannot be enforced, being *nudum pactum*, without consideration; though it may have been the inducement to the other to enter into the contract. The distinction is between such a case as this, and a purchase made by the employment, and for the benefit, of another; or a case where the party

* 157 can be made a trustee. The object *of this transaction was not that the house should be the testator's. If he had lived, and refused to pay the other instalments, the case would not have been varied: she would not have had any remedy. There is no contract in writing; by which alone, un-

(a) 29 Car. II. c 3

der the statute of frauds, one person can become liable for the debt or engagement of another.

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Crosbie v. M'Doual.

The Lord CHANCELLOR.

The justice and honour of this case are plain, but, as the precedent will be important, I shall consider the principle upon which it ought to be decided. If it were absolutely necessary to maintain that *Brown* could have considered the testator as the purchaser, I should think the report could not be supported, for, considering all that has passed, that cannot be maintained. But my opinion is that *Riley* originally was the agent of th testator for the purchase of the house; and, if the treaty had been carried on and completed in writing, *Brown* might have obtained a specific performance against the testator; for what the testator intended to do with the house afterwards would not have affected his character of purchaser, though Mrs. *Carmichael's* taste might have been consulted, as she was to live in the house; if, upon the whole transaction, he was to be the purchaser. I agree, however, as the contract was completed, the written contract would have prevented *Brown* attempting to sue the testator upon the parol agreement.

Two questions arise upon this exception: 1st. Whether Mrs. *Carmichael* might not have maintained an action against the testator, which is a point of considerable doubt: 2dly. If she could not, whether she might not be relieved in equity; notwithstanding the strict correspondence that subsists between the principles *of this Court, and those upon which the equitable action at law stands: the forms not being co-extensive, though there is a concurrence of principle. Various instances may be put of *nudum pactum* at law. If one man says to another he will give him 1,000*l.* to purchase a house, and actually pays part, that is a mere voluntary promise, *nudum pactum*, not the foundation of an * 158

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action. But put the case of a declaration; stating a promise, in consideration that the plaintiff would agree for the purchase of a house, and, leaving her own residence, would go and reside in that house, and execute the conveyance; and that the plaintiff did accordingly, at the special instance of the defendant, make the purchase, change her residence; and that she had been obliged to pay the money under the contract, and the defendant refused to perform his promise: would that be *nudum pactum;* where one party does not merely pay, but does some act; like the consideration under the head of contract in the civil law, "*facio ut facias?*" Suppose, for instance, *A.*, living in *Jamaica*, sends a cargo to *B.*, resident in *London*, who is not to receive any benefit, but is to deliver it over to another person, and is directed to insure. *B.* may refuse to receive the cargo, but, if he consents to receive it, though it is for the benefit of the consignor, he is bound to make the insurance; and many actions have been brought upon that principle.

Bailee, though without consideration, accepting the office, bound throughout for instance, by a direction to insure.

I am not prepared to say, this case goes the whole length of that: but it deserves consideration, whether a woman, having no desire to enter into this contract, no means of performing it, another person, not merely making a spontaneous promise, but causing her upon the faith of his promise to place herself in a situation insuring her ruin, if he should not perform it; and having executed part,
* 159 which is a strong indication of the *nature of the transaction, cannot in equity be compelled to execute the remainder, though the particular forms of law might not enable the plaintiff to reach it by an action. The question is, whether this is a case of that description, or mere *nudum pactum;* with a performance of part, giving no action for the remainder?

The Lord CHANCELLOR.

1806.

Crosbie v M'Doual.

*November* 26

I have no doubt, that Mrs. *Carmichael* is entitled to stand as a creditor of the testator at law in respect of this transaction; and that she might sustain an action for money laid out and expended for him. My opinion therefore is, that the Master has not drawn an improper conclusion from the facts stated in the report; and that opinion stands upon this ground. There is no doubt, that *Brown* could not have resorted to the testator for the purchase-money of this house; the conveyance being made to Mrs. *Carmichael*, not to the testator; against whom therefore *Brown* could not maintain an action, and must have been nonsuited: the parol contract being merged in the written one. But the question is, not what action could be maintained by *Brown* against the testator, not being the legal purchaser, but what action Mrs. *Carmichael* could maintain against the testator. The evidence states directions given by the testator to *Riley* to purchase this house; that after the purchase by *Riley* the testator informed Mrs. *Carmichael*, he much approved of the terms, and had given directions to *Riley* to complete it, and, pursuant to the directions of the testator, an agreement was prepared between *Brown* and Mrs. *Carmichael*, which agreement was made in her name, by the particular desire of the testator. My opinion is, that this is a sufficient foundation for an action of *assumpsit*; *and in the nature of the thing the statute of frauds(a) has no relation to it. The engagement between them was, that the testator having originally made the purchase, and engaged to pay the money to *Brown*, directed the conveyance to be made in Mrs. *Carmichael's* name; which she executed upon the faith that he would deliver her from the payment of the money, and performance of the covenants. That forms a consideration in the law. The statute of frauds has nothing to do with it, for this is not an engagement to answer for the debt of another; but, upon the faith that he will deliver her from the consequences, she undertakes to bind her- * 160

(a) 29 *Car.* II. c 3.

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self. The principle of law upon these actions is, that, though upon a mere voluntary promise an action does not lie, yet, if one man binds himself to pay, and does pay money in consequence of an obligation undertaken by another, the one has money, which, in equity and conscience, ought to be the money of the other; and that is not *nudum pactum*.

The exception was overruled.

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November 12 21 27.

A party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands, but cannot otherwise stop the progress of the cause, till he is paid

Upon the marriage of a female plaintiff, revivor alone will not do, where the interests of third persons, viz. trustees and the issue, must be brought forward, making a supplemental bill necessary.

But a motion to stay an attachment for want of answer was refused; being made with consent of the husband, in the face of his covenant, to permit the suit to be revived and prosecuted by the trustees in his name for the benefit of the family.

## *MERRYWETHER *against* MELLISH.

THE original bill in this cause was filed by Mrs. *Merrywether*, previously to her marriage, for an account against the executor of her father, and to have a release, which she had executed, set aside. By a deed, executed previously to and in consideration of the marriage, to which deed Mr. *Merrywether* was a party, the property, which was the subject of the suit, was invested in trustees for the separate use of the wife, and for the issue. Mr. *Merrywether* covenanted, that the trustees should be at liberty to revive and prosecute the suit in the name of Mr. *Merrywether*, on behalf of himself, his wife and children. The suit was revived accordingly, with the approbation of Mr. *Merrywether*; and, the defendant being in contempt to an attachment for want of an answer, a motion was made to stay the attachment.

The *Attorney-General* and Mr. *Owen*, in support of the motion, insisted that a supplemental bill was necessary.

Mr. *Heald*, for the plaintiff Mr. *Merrywether*, expressed his assent to the motion.

1806.

Merryweather v. Mellish.

Mr. *Leach*, appeared for the solicitor, who had been originally employed in the cause by Mr. *Merryweather*; objecting that the plaintiff, appearing by another solicitor, could not be heard; not having previously applied to the former solicitor to deliver over the papers, and offered to secure his costs; observing that the object of the motion might affect the lien for his costs.

*Mr. *Bell* (*amicus curiæ*) stated his conception of the practice to be, that, though a party cannot change his clerk in Court, he may change his solicitor. * 162

The Lord CHANCELLOR.

The lien of the former solicitor for his costs is undoubted; and the Court would not upon the motion do any thing to weaken it. But I believe there is no precedent, and I am sure there is no principle, that will justify the Court in refusing to hear a counsel upon instructions given to him by his client. The privileges of solicitors in this Court are not higher than those of attornies at law; perhaps not so high, as this Court has peculiar clerks of its own. At law the attorney has his lien; and unquestionably the party may change his attorney. It cannot be disputed that in any Court a plaintiff may discontinue his action, subject to the costs incurred; and it is for him to proceed or not, where it is his own spontaneous act. I am glad to find the clear opinion I have upon this point, confirmed by an authority for which I have the utmost respect. In the case of *O'Dea* v. *O'Dea* (a) Lord *Redesdale* would not permit a solicitor to prevent the hearing of the cause till his costs were paid; another solicitor having been substituted, acknowledging the lien of the former for his costs.

At law lien of an attorney upon papers for his costs; but the plaintiff may discontinue his action, subject to the costs incurred.

(a) *Schoales' & Le Froy's Rep.* p. 315.

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Merrywether v. Mellish

November 27.

The Lord CHANCELLOR.

It is agreed in this case, that in consequence of the marriage it is not enough that the suit has been revived; but a supplemental bill is necessary to bring forward third persons, and the question is, whether, *though the suit is to go on as a supplemental suit, the Court will in this state of circumstances allow a party, bound by his covenant to permit a bill to be filed in his name, which has been filed accordingly, the suit having gone so far as to put the defendant in contempt, to prevent the plaintiff from making use of the answer to the original bill in the supplemental suit. This defendant was not only called upon in the revived cause by the trustees, in whose names it was carried on, but *Merrywether* after the revivor approved what had been done in that respect. By the deed, executed upon the marriage, he stipulated that the right of his wife to pursue the suit should be acted upon according to that instrument. The effect of that contract is, that the wife, the children, and the trustees, are in equity entitled to controul his marital right, so that the conduct of the suit depends, not upon his will, but, upon the sound discretion of the trustees. The attempt to prevent the prosecution of the suit by an act of the defendant, in concert with *Merrywether*, is in opposition to the rights under the settlement, and, therefore, subject to the controul of the Court. I must act upon the settlement by refusing the motion made with the consent of *Merrywether*. The defendant should avail himself of the defect, the children and trustees not being parties, by plea or answer; which would compel the trustees to make the bill supplemental, as it ought to be, bringing the proper parties before the Court. The covenant of *Merrywether* is, that the suit shall be revived and prosecuted, in his name, for the benefit of himself, his wife and children. If the suit is wantonly prosecuted by the trustees, without a chance of success, as is suggested upon the affidavit, the Court might interfere by a reference to the Master, to inquire whether it was for the benefit of the *cestuis que trust*.

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Merrywether v. Mellish.

That is the only way in which he *can get rid of the effect of the contract. But that cannot be till after the answer; and, as it stands now, *Merrywether* cannot be permitted in the face of his covenant to consent to this motion.

The attachment must therefore go.



COUSINS *against* SMITH.

*November* 28.

Injunction pending a demurrer irregular.

THE bill prayed a discovery and injunction against proceeding in an action. In *Trinity* Term a demurrer was put in. On the 2d of *August* the common injunction was obtained until answer, or farther order; the order for the injunction stating that the demurrer was put in for delay. A motion was made to discharge that order for irregularity.

The defendant had obtained judgment at law.

The *Solicitor-General*, in support of the motion.

The practice is settled that a demurrer being put in to the whole bill, both for discovery and relief, the plaintiff cannot obtain an injunction; for which there are only two grounds: an order for time; and an attachment issued for want of an application for time. The demurrer insisting that the plaintiff has no equity, how can he have an injunction? The practice is clearly stated in *Harrison*,(a) the *Practical Register*,(b) and, as to a plea, in the case of *Humphreys* v. *Humphreys*.(c) How can the Court know that the demurrer *is put in for delay, as the order improperly asserts?

(a) 1 *Har. Ch. Pr.* p 212.

(b) *Pr Reg.* p. 236. Mr. *Wyatt's* edit.

(c) 3 *P.Wms.* 395.

1806

Cousins v. Smith.

*The Attorney-General* and Mr. *Wetherell*, for the plaintiff.

The authorities, referred to, are old, and are opposed by the modern practice. If this can be done, though the injunction be the whole object of the suit, it may be thus defeated. The defendant has judgment; and the only effect of the injunction is to stay execution, and only until a decision upon the demurrer, which has been some time set down for argument by the plaintiff, not the defendant, and the decision has been prevented only by the pressure of other business. The injunction was obtained after the expiration of the eight days, certainly after the demurrer was put in. A demurrer not being put in as a plea is, upon oath, the Court has no security for the defendant's right to resist the equity of the bill. A plea prevents an injunction upon the same ground as an answer; a plea being *pro tanto* an answer. A plea or answer, disclosing new matter, may disclose something, that will prevent the equitable relief. That cannot apply to a demurrer; disclosing nothing; on the contrary, admitting the facts in the bill, and not put in upon oath. There are reasons therefore against an injunction, where a plea or answer has been filed, which do not apply to a demurrer.

The *Solicitor-General*, in reply.

The alleged practice rests only upon private opinion against authorities. The lapse of the eight days is immaterial. That does not give a right to the injunction, which can be obtained only upon an order for time, or an attachment for want of that order. There is no *instance
166 of an injunction pending a demurrer. Applications are frequent to have a demurrer argued out of course; and the reason assigned is, that it prevents an injunction. The distinction between a plea and demurrer, the former being on oath, the latter not, is immaterial for this purpose. A plea admits the equity upon the facts stated: a demur-

rer insists, that upon the facts stated there is no equity. The object of a bill for an injunction generally is delay; of which it is a most grievous instrument. According to this alleged practice, if a bill should contain the most absurd statement, the defendant must answer the whole, or let the injunction go. The objection of delay is obviated by the common practice of application to have a demurrer argued immediately. The defendant is not to set down the demurrer. It is not his business to press on the argument. He has his object, preventing an injunction, the effect of the demurrer. Either party may set it down for argument. The delay, therefore, is the plaintiff's. Injunctions are never favoured. The Court of Exchequer is more in the habit of granting them than this Court. The practice of that Court is, if the demurrer is overruled, to grant the injunction immediately, which is reasonable, as the Court then may know, what is improperly stated in this order, that the object of the demurrer was delay.

1806.

Cousins v Smith.

The Lord CHANCELLOR.

Upon a point of practice, if I had found authorities both ways, I should have taken time to consider. But this case presents no difficulty. Upon a special application for an injunction, upon a bill filed and affidavits, every thing connected with the bill, is before the Court. But this sort of injunction issues upon a bill of which the Court knows nothing. If the answer does *not come in within eight days, the defendant may apply for time. If he does not obtain an order for time, the plaintiff may have an attachment, and when an attachment is sealed, or an order for time is obtained, in either case the Court presumes, there is something in the bill, entitling the plaintiff to an injunction until answer or farther order. But, if the defendant puts in a demurrer, he informs the Court upon the record, that there is no equity in the bill. Then can the

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Injunction upon an order for time, or an attachment for want of an answer after the eight days expired.

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Cousins v. Smith.

Court, so informed, grant an injunction? How can the Court determine, that the demurrer is put in for delay? The evil is rather the other way; for it is well known, that frequently after a verdict at law a bill for an injunction is filed merely for delay. Why am I to presume, that there is a case for an injunction; the defendant insisting upon the record, that there is no equity in the bill? Consider the inconsistency of such practice; if upon the argument of the demurrer it should turn out, that I had no authority to grant the injunction, the demurrer insisting upon that, upon application I would have ordered the demurrer to be argued immediately. No instance is cited of an injunction granted pending a demurrer; and my opinion is, that the injunction ought not to have issued; and therefore the order must be discharged.

## LANGDALE *against* LANGDALE.

*December* 5

Bill dismissed by one co-plaintiff as to himself with costs, without the consent of the other.

A MOTION was made by one co-plaintiff, that the bill, as far as he was concerned, may be dismissed with costs. The defendant consented to the motion: but there being no consent by the other co-plaintiff, the register declined to draw up the order.

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*Mr. *Dowdeswell*, in support of the motion, said, there was no occasion to give notice to the other co-plaintiff; and cited the *Practical Register*(a) and the case referred to by Mr. *Wyatt*, as an authority, that one co-plaintiff may have the bill as to himself dismissed with costs, without the consent of the other.

(a) Pr. Reg. edition by Mr. *Wyatt*, 179, *Bathew* v. *Needham*, In Chancery, after *Hilary* Term, 1797.

The Lord CHANCELLOR upon that authority made the order.

1806.

## JUDD *against* PRATT.

Baron SUTTON.
Mr. SIMEON, } Masters in Chancery.
Mr. COX,

ROLLS.
*November*
*December* 2.

Devise by the general terms, "all the rest, residue, and remainder of my real and personal estate of what nature," &c soever, to nephews and nieces, not being for creditors, wife, or children is not sufficient to raise a case of election, or for supplying the want of surrender of copyhold land, contiguous and intermixed with the freehold, against the heir.

WILLIAM PRATT by his will, after giving several legacies, and devising a freehold messuage, in *Banbury*, called the *Flower-de-luce*, to *John Vigers* and *Ann* his wife, for their lives, and the life of the survivor, disposed, as follows:

"And as to all the rest, residue, and remainder, of my "real and personal estate and effects whatsoever and where-"soever, and of what nature or kind soever, and also the "said messuage or public house called the *Flower-de-luce* "after the decease of the said *John Vigers* and *Ann* his "wife, and the decease of the survivor of them, I give, de-"vise, and bequeath the same" unto *William Judd*, *Richard Herbert*, and **William Walford*; "to hold to them, "their heirs, executors, administrators, and assigns, upon "trust that they my said trustees and the survivors and "survivor of them, his heirs, executors, administrators and "assigns, do and shall sell and dispose of my said real es-"tate, and do and shall convert my said personal estate into "money, and do and shall, out of the monies arising from "my said real and personal estate, in the first place pay "thereout all my debts, whether due on mortgage or other-"wise, and from and after payment of the same then upon "trust that they my said trustees and the survivors and sur-"vivor of them, his heirs, executors, administrators and as-"signs, do and shall pay and apply the residue of the money "arising from my real and personal estate and effects as "follows." * 169

1806.

Judd v. Pratt

The testator then gave several legacies to different persons: among others, to his nephews and nieces, children of his late brother *John Pratt*, as follows: to his nephew *William Pratt*, the sum of 500*l.* and other smaller sums to his other nephews and nieces; with survivorship. He then made the following residuary disposition.

"As to all the rest and residue of the money which "shall arise from my said real and personal estate and ef- "fects, or which shall come to the hands of my said trus- "tees by any means whatsoever, I give and bequeath the "same unto all my said nephews and nieces, the children of "my said brother *John Pratt*, in equal shares and propor- "tions;" with survivorship.

The testator was at the date of his will, and at his death,
* 170 seised of three closes, called *Yeates's;* which *were copyhold of inheritance, held of the manor of *Adderbury*, in the county of *Oxford;* which premises he had purchased; and had been admitted, to hold to him and his heirs according to the custom. He was also seised of another close, called *Wise's*, partly freehold, and partly copyhold of inheritance, held of the same manor; to the copyhold part of which he had also been admitted, to hold to him and his heirs according to the custom. These premises he had also purchased at a period subsequent to the other purchase, but previous to the date of his will. The freehold part comprised 11 *a.* 2 *r.* 34 *p.*; and the copyhold 3 *a.* 3 *r.* 18 *p.* All these premises were contiguous, and intermixed; and the freehold and copyhold parts of *Wise's* were not divided by fences. They were occupied together by the testator; and at the time of his death were held by a tenant under a joint demise by the testator, at the annual rent of 100*l.* Besides these premises and the house, called the *Flower-de-luce*, the testator died seised of other freehold estates; a very inconsiderable part of which was purchased after the date of his will. The testator had

not surrendered his copyhold premises to the use of his will. 1806. Judd v. Pratt.

The bill was filed by the trustees against the eldest nephew and heir at law, and according to the custom; who had received his legacy of 500*l.* and a considerable sum on account of his share of the residue; praying, that he may be decreed to be put to his election, either to abandon the benefits bequeathed to him, and to refund the payments made; and that in such case, his legacy of 500*l.* and his share in the said residuary fund may sink into the residue for the benefit of the parties entitled thereto; or, in case he insists upon the benefits of the said bequests, that then he may relinquish all right to the said copyhold premises, and *may be decreed to surrender them to the plaintiff, &c. and that he may be restrained from proceeding in an ejectment. * 171

The defendant by his answer, insisted that it was not the intention of the testator to include the copyhold premises in the general devise; and that he ought not to be put to his election, but is entitled to the copyhold premises, and also to the legacy of 500*l.* and the share of the residue.

(*a*)Mr. *Fonblanque* and Mr. *Woodaeson*, for the plaintiffs.

The common equity upon the doctrine of election is established by *Noys* v. *Mordaunt*,(*b*) *Streatfield* v. *Streatfield*,(*c*) *Cookes* v. *Hellier*,(*d*) *Whistler* v. *Webster*,(*e*) and many other cases. It goes to this extent, that even where the devisor takes upon him to devise that over which he has no power, upon the supposition, that the owner, taking a benefit under the disposition will acquiesce in it, this Court compels him, if he chooses to take under the will, to take entirely, not partially under it: supposing a tacit condition, that a person, claiming under a will, shall not

(*a*) The arguments *ex relatione*.

(*b*) 2 *Vern.* 581.

(*c*) *For.* 176.

(*d*) 1 *Ves.* 234.

(*e*) *Ante*, vol. 2. p. 367.

1806. Judd v. Pratt.

disturb the disposition made by it. In a case,(*f*) before Lord *Talbot*, the testator devised a close, which belonged to *A.*; bequeathing to him 200*l.* Lord *Talbot* held, that, if *A.* took the legacy, he must give up his close, to the devisee.(*g*) *Cases of election are a class perfectly distinct from those upon supplying the want of a surrender; in which the Court acts imperatively *in rem*. In *Rumbold* v. *Rumbold*,(*a*) the Lord Chancellor says, the question is only, whether Sir *Thomas Rumbold* meant to devise "the "copyhold estate: it is not a question, whether the Court "is to supply a surrender."

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(*a*) *Ante*, vol. 3. p. 65.

The words of this will, if the question depended upon their legal operation, sufficiently express the intention. General words are a sufficient description to include copyholds unsurrendered, where a moral purpose is to be answered: *Drake* v. *Robinson*,(*b*) *Harris* v. *Ingledew*,(*c*) *Car* v. *Ellison*,(*d*) *Tendril* v. *Smith*,(*e*) *Wardell* v. *Wardell*,(*f*) *Wilson* v. *Ardesoif*,(*g*) *Frank* v. *Standish*.(*h*) The distinction taken in *Lindopp* v. *Eborall*,(*i*) is unreasonable. In *Haslewood* v. *Pope*,(*k*) and *Hawkins* v. *Leigh*,(*l*) the general words were controuled. But those were not cases of election; and there is no instance, that, the heir taking a benefit by the will, the surrender has not been supplied. The defendant's construction is repugnant, as it renders the words "all the rest, residue, "and remainder," &c. of no *effect. Could the devisor, using these general words, mean to except the copyhold estates?

(*b*) 1 *P. Wms*. 443.
(*c*) 3 *P. Wms*. 91.
(*d*) 3 *Atk*. 73.
(*e*) 2 *Atk*. 85.
(*f*) 3 *Bro. C. C*. 116.
(*g*) MSS.
(*h*) 1 *Bro. C. C*. 588. Note. cited by Mr. *Wooddeson* from a MS. of Chief Baron *Skynner*.
(*i*) 3 *Bro. C. C*. 188.
(*k*) 3 *P. Wms*. 322.
(*l*) 1 *Atk*. 387.

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(*f*) *Nov*. 5. 1736. In Chancery.

(*g*) The principle of election is compensation; not forfeiture, as in the case of express condition. The distinction, though not generally observed, is marked with precision by Lord Commissioner *Eyre*, *ante*, vol. 1. p. 523 *Blake* v. *Bunbury*; and by Lord Chief Justice *De Grey*, *ante*, vol. 2 p. 560 Lady *Cavan* v. *Pulteney*. See farther upon the doctrine of election, *Blount* v. *Clitherow*, *ante*, vol. 10. p. 589. and the references.

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Mr. *Richards*, and Mr. *Wingfield*, for the defendant, relied principally upon *Byas* v. *Byas*,(a) and *Lindopp* v. *Eborall*.(b)

December 2.

Baron SUTTON stated the case; and delivered the judgment of the Court.

(a) 2 *Ves.* 164.

(b) 3 *Bro. C. C.* 188.

The question in this cause is, whether the testator has by these words in his will so distinctly marked his intention to pass his copyhold estates, taking in aid the circumstance, that the freehold and copyhold lands were contiguous and intermixed, that the heir should be put to his election, either to forego the benefit under the will, or to supply the defect of a surrender. The general rule is, that, to put an heir to election, the intention to dispose of that which he claims as descending to him, must distinctly appear, either upon the will; or, if the Court is at liberty to go out of it, from circumstances clearly denoting an intention that the interest, which the heir insists descended to him, should pass by the will. It is contended, that the circumstances, that the freehold and copyhold lands are intermixed, and that the testator has used these very general words, "all the rest, residue, and remainder of my "real and personal estate and effects whatsoever and "wheresoever, and of what nature and kind soever," do sufficiently denote an intention to pass the copyhold estates, though not surrendered, and therefore the election must take place.

General rule, that, to put an heir to election, the intention must distinctly appear Whether it may be shewn from circumstances *dehors*. *Quære*.

*The counsel for the plaintiff have referred to several cases. In *Car* v. *Ellison*,(a) the testator had only the trust in the copyhold. He had not the legal estate. He therefore could not surrender. The first question was, whether the general words were sufficient to pass the trust; and Lord *Hardwicke* declared his opinion, that the trust of the copyhold estate would pass without a surrender, as the

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(a) 3 *Atk.* 73.

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surrender must be by the person who has the legal estate. Lord *Hardwicke* also did look to circumstances *dehors* the will; and relied much upon the circumstance, that the copyhold estate had come from the testator's wife, and was limited by the marriage settlement to the husband; from that and other circumstances inferring a clear intention that under the general words the copyhold estate should go back to the wife, from whom the testator had received it. But that case is materially distinguished; as the testator had not the legal estate, and could not surrender, and general words do sometimes pass a trust in a copyhold. Perhaps other circumstances may be required. The will was the proper instrument to pass the trust. Lord *Hardwicke* certainly did in that instance go into circumstances. That is a very dangerous doctrine, and is reprobated in *Stratton* v. *Best*.(b) Lord *Thurlow* anticipated the danger from suffering that sort of evidence as to the intention of the testator. It is necessary, to shew the property, which is the subject of the disposition; but ought not to be admitted to shew the intention. The case of *Car* v. *Ellison* therefore is not applicable.

Devise of the trust of copyhold by general words.

(b) *Ante*, vol 1. p. 285

Circumstances *dehors* the will, may be evidence as to the property, not as to the intention.

In the case of *Unit* v. *Wilkes*(c) the will has general words: but there is a provision that in case the *testator's wife should continue to live in his house at *Willenhall*, then the trustees shall permit her to make use of his household goods and other articles. That house appears to have been part of the copyhold estate: therefore the decision was not upon the general words; but from the circumstance of that provision it clearly appeared that the testator had before, under the general words, given the copyhold estate, as well as the freehold; for his wife could not continue to live at *Willenhall*, unless she took it under the general words. Lord *Henley* relied upon that fact, not upon the general words, independent of it.

(c) *Amb*. 430.

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In *Tendril* v. *Smith*,(a) the testator had marked his intention, that the copyhold estate should pass; having sur-

(a) 2 *Atk*. 85.

rendered it to the use of his will; and then the general words were sufficiently comprehensive. But the intention was discovered by the surrender.

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The case of *Rumbold* v. *Rumbold*,(b) turned upon this expression, "the copyhold part thereof having been previously surrendered to the use of my will;" with the circumstance, that he had no other copyhold estate; and it was held a mistake; that the will shewed a manifest intention to pass the copyhold estate; and, as there was no copyhold, except that one, which was not surrendered, that defect was supplied by putting the heir to election.

(b) *Ante*, vol. 3. p. 65.

The case of *Wilson* v. *Ardesoif*, cited by Mr. *Wooddeson* from the manuscript, is distinguished also by the use of the word "copyhold." In the case of *Frank* v. *Standish*(c) also, "copyhold" being expressly mentioned, the intention was held to be sufficiently clear.

(c) 1 *Bro. C. C* 588. Note.

*These are all the cases that were cited in support of the proposition, that the testator having used only general words, the intention to pass the copyhold estates is sufficiently marked to put the heir to his election, either to take by his common law title, giving up the interests given to him by the will, or to supply the want of a surrender. They do not make out that proposition, or afford us sufficient authority to decide the point. On the other side several cases have been cited against the proposition; one of which is decisive. One of these cases, *Lindopp* v. *Eborall*,(a) introduces a distinction very material to the decision of this case. The testator in that instance had only the trust; but he had the means of obtaining and devising the legal estate by being admitted, and surrendering to the use of his will. Lord *Thurlow* held, that the copyhold estate did not pass; "for, although where the copyhold "is necessary to pay debts, it is held equivalent to a descrip- * 176

Different construction in favour of creditors, wife or children, and in other cases.

(a) 3 *Bro. C. C.* 188. See *Kidney* v. *Coussmaker*, *ante* vol. 12 p. 136

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"tion of it, yet, here, it not being necessary for that pur-"pose, it should not pass for the farther purpose of going "to the younger child; the Court had only held that, "where the child was unprovided for; not where the "question was as to the more or less of the provision; "to which the intention could never be held to apply."

At first it appears very difficult to understand this distinction. But the doctrine is not new. The same principle is laid down by Lord *Macclesfield* and Lord *Talbot*, and it goes this length, that the Court having regard to the relation of the parties, will put a different construction upon the same words; if there are creditors, a widow, or children, a construction shall be given, different from
* 177 that, which will be applied in such *a case as this; the parties being only distant relations, not having the character of creditors, widow, or children.

(a) 1 P Wms 443
(b) 3 P Wms 322.

In the cases of *Drake* v. *Robinson*(a) and *Hashwood* v. *Pope*,(b) this distinction is very clearly laid down, both by Lord *Macclesfield* and Lord *Talbot*; that the Court will put a different construction upon the same words from the relation of the parties. It is going a great way. In *Coombes*
(c) 1 Bro. C. C. 373
v. *Gibson*(c) the Court also looked to the same distinction; that, where it is necessary for payment of debts, the other funds not being sufficient, these general words will comprise the copyhold as well as the freehold estates. If, as it
(d) Mr *Richards* from his recollection of that case said the freehold estate was nothing
is said,(d) the freehold estate was nothing, then that case is not inconsistent; and that distinction, therefore, has been clearly held to authorise a construction of these words in such cases, which between other parties, and under other circumstances, the Court will not make.

These authorities have gone only to this extent, that the heir shall be bound to supply the defect of the surrender in favour of creditors, or the family, *i. e.* the widow or children; but not so far as that he shall be put to his election. But it is said they do not establish the point against the

plaintiffs; that the heir is not bound to elect. I do not understand that. What puts him to election but an intention that what he claims by law shall pass by the will? That construction is applied to these general words only in the case of creditors, a widow or children. But there is another case that goes the whole length of this: *Byas* *v. *Byas*;(a) which has almost every circumstance that occurs in this instance. That case is not put upon the ground that the heir was called upon to supply the want of surrender. He might have been called upon to make his election; but it does not appear to have occurred to any one to put it upon that ground. The heir was put to his election as much as in this case, if from the general words, which are not to be distinguished from those in this will, a clear intention could be collected that the estate, claimed by the heir, should pass. That intention must be clearly shewn. In this will copyhold estates are not mentioned; and there is no surrender. There are merely these general words, which are satisfied by the freehold estate. Our opinion, therefore, is, according to the distinction that has been taken, that the construction, aimed at by these plaintiffs, is not to be given to these general words, except in favour of persons standing in a relation to the testator, different from that in which they are placed, and that the intention is not so clearly marked as to put the heir to his election. * 178

The bill was dismissed without costs.

Mr. *Hall*, (*amicus curiæ*) mentioned *Church* v. *Mundy*(b) as a stronger case; which was agreed to by Baron *Sutton*.

(a) 2 *Ves.* p. 164 (b) Reported since, *ante*, vol 12. p 426

1806.



December 5, 6

## *EX PARTE LAMBERT.

A person taking up a bill for the honour of the drawer, has no right against the acceptor without effects

IN 1792 *Adams & Co.* merchants at *New-York*, having considerable dealings with *Lane*, *Frazer*, and *Boylston*, of *London*, drew two bills upon them: one dated the 18th of *October*, at 120 days' sight, for 158*l.* 16*s.*; the other dated the 5th of *December*, at 90 days' sight, for 600*l.* The bills were accepted. The first that became due being dishonoured, both bills were taken up by the petitioner for the honour of the drawers, upon the 22d of *February*, 1793. On the 20th of *April*, 1793, a commission of bankruptcy issued against *Lane*, *Frazer*, and *Boylston*. *Adams & Co.* also failed; and proceedings took place in *America* for the purpose of dividing their estate among their creditors, under which the petitioner received a dividend of 4*s.* 2*d.* in the pound, upon the bills he had taken up. The commissioners under the commission of bankruptcy against *Lane*, *Frazer*, and *Boylston*, rejecting his proof for the balance, on an affidavit of one of the bankrupts that they had no effects, and the bills were for the accommodation of the drawers, the petition was presented, praying that he may be admitted to prove.

Mr. *Richards* and Mr. *Cullen*, in support of the petition. The *Solicitor-General* against it. The case *ex parte Wackabath*(a) was cited in support of the petition, and was disapproved by the Lord Chancellor.

(a) Ante, vol. 5 p. 574.

*180 *The Lord CHANCELLOR.

I continue of the opinion I expressed yesterday. Upon this affidavit there is no doubt that if *Adams & Co.* had themselves been plaintiffs in an action, the acceptors of these bills might, as against them, have insisted that the bills were drawn merely for the accommodation of the drawers, and they had no effects; though that would not have been

an answer to an indorsee for valuable consideration, without notice. Then what is this case? A bill, accepted, being dishonoured, is taken up for the honour of the drawer by the petitioner. The effect is, that he has a clear right as against the drawer. So, he has a right to stand in the place of the drawer, but cannot make a title stronger than that of the drawer, and oust the assignees of the bankrupts of the defence which they would have against him.

1806

Ex parte Lambert.

The petition was dismissed.

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## TAYLOR *against* OKEY.

*December* 5, 6.

Set-off, where a creditor had borrowed from the debtor under an express promise to pay.

MR. WINGFIELD, for the defendant, moved to dissolve an injunction.

Mr. *Fonblanque* and Mr. *G. Wilson* shewed cause.

The point was upon a claim to set off against a debt a sum of money borrowed by the creditor from the debtor under an express promise to pay. They cited *Atkinson* v. *Elliott*,(a) and *Lechmere* v. *Hawkins*.(b)

(a) 7 *Term Rep.* p. 378.
(b) 2 *Esp. N. P. Cas.* p. 626

*The Lord CHANCELLOR.



*December* 6

My opinion is, that this claim of set-off must be allowed in equity; and, except from the circumstance that the parties are not the same, it would do at law, under the authority of *Lechmere* v. *Hawkins*, which is precisely this case. The argument addressed to me yesterday for dissolving the injunction was the same that I used; that the express promise bound the party, making it an absolute payment under all circumstances, but Lord *Kenyon* answered, that he knew no such law; and did not think there was any such legal obligation, and the mutual de-

1806. Taylor v. Okey

mands were within the statute of set-off. But what weighs with me, is what was said by Lord *Kenyon*, who was perfectly acquainted with the rules of equity; that, if he should refuse the set-off, it would drive the party into equity.

## EX PARTE KING.

*December* 6

The discretion of the commissioners as to the bankrupt's certificate not controuled.

THE petitioner *John King*, a bankrupt, having since the failure of his former petition,(*a*) for a direction to the commissioners to make their certificate of his conformity under the statute,(*b*) failed in an application to the Court of King's Bench for a *mandamus* to the commissioners to sign his certificate,(*c*) renewed his application.

Mr. *Plowden*, in support of the petition, prayed an order
* 182 that the commissioners should produce the *reasons they had given, in writing, for refusing to sign the certificate.

The Lord CHANCELLOR.

The commissioners have a power to make their certificate under the act of Parliament. I have no authority to compel them to make any other certificate. Why is a copy of their reasons to be granted, when nothing can be done upon it? You may as well apply for my reasons, when the certificate comes before me. I can make no order upon them to certify, whatever reasons they may give. It is for the determination of their conscience, as it will be afterwards of mine. Their jurisdiction under the statute for this purpose is as distinct as uncontroulable, and as much without appeal as mine. Their certificate will be of no avail if mine is not added; but, I cannot an-

(*a*) *Ante*, vol. II. p. 417. (*b*) Stat. 5 *Geo* II. c. 30. (*c*) 7 *East*, 92

1806.

Ex parte King.

and their certificate, or make them sign, or blot out what they have signed. I can render their certificate nugatory by withholding my confirmation; but have no authority to controul, advise, or counsel them upon the subject.

No order was made.

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## *EX PARTE HERBERT.

*November* 5.
*December* 8.

Mortgagee not permitted to tack as against assignees in bankruptcy a mortgage subsequent to an act of bankruptcy, though without notice, and previous to the commission; and though he had the legal estate.

THOMAS JONES, possessed of two leasehold houses, one for a term of 99 years, by lease dated the 29th of *September*, 1769, the other for 96 years from the 3d of *July*, 1772; in *February*, 1804, made a mortgage of the latter to *John Morgan*, to secure 80*l.* By indentures dated the 1st of *April*, 1805, reciting that mortgage, that 85*l.* was due upon it; that *Watkin Morgan* had agreed to advance that sum upon security of both the above mentioned premises; that *Jones* was indebted to *Watkin Morgan* in the sum of 421*l.* 5*s.* for money advanced for him, and that *Watkin Morgan* agreed to advance 21*l.* more, in consideration, &c. *Jones* assigned all the above mentioned leasehold premises to *Watkin Morgan*, subject to redemption on payment of 527*l.* 5*s.*

Upon the 31st of *May*, 1805, a commission of bankruptcy issued against *Thomas Jones* and *Richard Matthews*, who carried on the trade of timber-merchants in partnership. The assignees under that commission sold the leasehold premises for 780*l.*; and the petition was presented by them, stating, that the bankrupts had committed acts of bankruptcy previous to *January*, 1805; that *Watkin Morgan* claiming as mortgagee, it was agreed between him and the petitioners that the agreement for the sale should be carried into execution, and the deeds be delivered to the petitioners; but that the sum of 550*l.* part of the purchase money should be deposited, to abide the event of such

1806 claim; and, that the petition should be presented for the purpose of determining whether *Morgan* was entitled to have any benefit under the mortgage-deeds he held. The petition insisted, that *Jones* having committed divers acts

Ex parte Herbert

* 184 *of bankruptcy previous to the said mortgage to *Watkin Morgan*, the said mortgage is void: particularly as *Morgan* knew that *Jones* was insolvent and had committed acts of bankruptcy, and made such mortgage, in contemplation of bankruptcy, for the purpose of giving a preference. The petition prayed accordingly, that the securities, upon which the sum of 500*l.* had been deposited, may be delivered to the petitioners.

The *Solicitor-General*, in support of the petition.

The question is, whether the assignees in this case cannot redeem without paying all the money that has been advanced. The case of *Collet* v. *De Golls*,(*a*) will be opposed to this petition, as an authority for protecting a mortgagee, making farther advances, subsequent to the bankruptcy without notice. That case certainly decides that a Court of Equity will not under such circumstances give any assistance to the assignees, unless they pay all that is due. Why is not the same course pursued in all other cases? Why is this relief confined to the single case of farther advances by a mortgagee, made after a bankruptcy without notice? Yet certainly it never has been extended, though very hard cases have occurred. That case of *Collet* v. *De Golls* was cited in *Latouche* v. *Lord Dunsany*,(*b*) before Lord *Redesdale*, who considered it as overruled, observing, that it is now the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy. If that case has been acted upon, it is extraordinary that it should not be noticed in any subsequent case.

(*a*) For 65

(*b*) 1 *Schoales' & Lefroy's Rep* 137 See p 152

* 185 **The Attorney-General* and Mr. *Cooke*, for the mortgagee, *Watkin Morgan*.

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Ex parte Herbert.

As it is not pretended that any act of bankruptcy was committed previous to the assignment of the lease of 1772, in *February*, 1804, to *John Morgan*, that assignment was effectual to pass the legal estate, which afterwards was assigned to *Watkin Morgan*, who paid off the first mortgage, and made a farther advance. The question is the same as upon a bill: upon what terms your Lordship will give the assignees the assistance of equity, and take the legal estate from the person, who, having that, does not apply for equitable aid, which they come for, not being able to bring an ejectment. In such a case a Court of Equity has never dispossessed the legal estate, except upon the terms of paying all that is due to the party who has it. No instance can be produced of a mortgagee, having assignment of the legal estate by paying the person who had it, and advancing money without notice of any act of bankruptcy, who was compelled to give up the legal estate and the deeds, unless he was paid the whole. Lord *Redesdale's* opinion (*a*) is expressed in a few general words. In the late case, *ex parte Knott*,(*b*) *Collett* v. *De Golls* was cited to Lord *Eldon*, who certainly was not aware that the authority of that case had been impugned. It was well considered by Lord *Talbot*, and is supported by the general principle, that those who come solely upon equity to dispossess a person of the legal estate, must do equity. This question must be decided upon principles of equity; as in bankruptcy there is no jurisdiction over a creditor who does not come in under the commission. Upon one of the clearest of those principles *a general rule is established, not to give relief against a *bona fide* purchaser without notice: a rule that has never been impeached, except in *Strode* v. *Blackburne*,(*a*) which case was afterwards overruled by Lord *Eldon* in *Wallwyn* v. *Lee*.(*b*) A purchaser for valuable consideration without notice is not on any account to be disturbed in equity; no more in favour of assignees and creditors than other persons. *Abery* v. *Williams*,(*c*) *Walker* v. *Bodington*.(*d*)

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(*a*) 1 *Schoales & Le Fro.* 132

(*b*) *Ante*, vol 11 p 609

(*a*) *Ante*, vol 3 p 222

(*b*) *Ante*, vol 9 p [illegible]

(*c*) 1 *Vern* p 27 (*d*) 2 *Ver* 599

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Ex parte Herbert.

The *Solicitor-General*, in reply.

(e) 1 *Vern.* 27. edit by Mr. *Raithby.*

As to the case of *Abery* v. *Williams*, in *Vernon*,(e) the last edition of which is very carefully executed, and very valuable from the examination of the register's book, no authority is referred to except *Collet* v. *De Golls*. There cannot be a doubt, that in such a case the party would be compelled by the commissioners to make a full discovery of all the circumstances, under which the effects of the bankrupt got into his hands. In this instance the whole equity depends upon getting in an old mortgage for 80*l.* It is to be lamented, that the right should depend upon such accidental circumstances.

The Lord CHANCELLOR.

The mind of a judge inclines much in favour of a person standing as a purchaser for valuable consideration without notice. This case, however, may not turn upon that
* 187 principle. The question seems to be, whether *a man, deprived by statute of all relation to his property, can be considered as a purchaser.

*December* 8. The Lord CHANCELLOR.

Severity of the relation under the bankrupt law mitigated by stat. 46 *Geo.* III. c. 135.

(a) Stat. 46 *Geo.* III c.135.

In this case I give the decision, which I feel myself compelled to make, with great reluctance; lamenting the severity of the relation under the bankrupt statutes. The effect of that has been considerably mitigated by the late act of Parliament,(a) for which the public are under great obligation to the Solicitor-General. This petition is presented under an agreement between the assignees of the bankrupt and the mortgagee, *Watkin Morgan*, who was in possession of two leases, one assigned by the bankrupt previously to his bankruptcy, to *John Morgan*, and by him after the bankruptcy, to *Watkin Morgan*, clearly for a full

consideration; and the other a direct assignment from the bankrupt after the act of bankruptcy, but before the commission, by way of mortgage for the sum advanced. *Watkin Morgan* claiming as mortgagee, a proposal was made by the assignees of the bankrupt, and assented to by *Watkin Morgan*, that the indentures should be delivered up on having 500*l.* secured; the assignees agreeing to present a petition, and *Watkin Morgan* agreeing to answer it, and to abide the determination. In consequence of that agreement the petition was presented.

1806.

Ex parte Herbert.

It is not necessary to break in upon those cases, that permit a purchaser for valuable consideration, asked to disclose the infirmity of his title, to plead the purchase for valuable consideration without notice; for he stands upon that right; and comes into equity quite wide of the consideration of the bankrupt statutes. But administering *the bankrupt law, notwithstanding the respect I have for Lord *Talbot*, I scarcely know how to express a doubt upon this point. It came before Lord *Eldon* in *Ex parte Knott*;(a) for the case of *Collet* v. *De Golls*(b) was relied upon in favour of the petitioners. But, though Lord *Eldon* did not decide upon it, his Lordship gave reasons that strongly mark his opinion. The proposition, that the assignees take subject to all the equities under which the bankrupt stood, is unquestionable; that is, with reference to what was the estate of the bankrupt, they shall stand as he would if he was solvent. But the moment an act of bankruptcy is committed, there is an end of all relation between the individual and his property; and the party taking the security afterwards, as Lord *Eldon* observes, takes nothing. All the cases in which a purchaser has been protected, are, where he has taken the property; but it has been incumbered by a prior conveyance. Then he has what he has a right to consider a conveyance; and the Court has refused to interfere, and disturb a title standing upon valuable

Plea of purchase for valuable consideration without notice.

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(a) *Ante* vol. 11. p. 609.
(b) *For.* 65.

Assignees in bankruptcy take subject to all equities, under which the bankrupt stood

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consideration, without notice. But this is nothing; no title.

Severity of the relation under the bankrupt law mitigated by stat 1 *Jac* I c. 15 s 4 Stat. 21 *Jac* I c 19 s 14 Stat. 19 *Geo* II c 32 Stat 46 *Geo* III. c. 135.

The language of the statute(c) of Queen *Elizabeth* is very strong; putting an end to every thing the moment an act of bankruptcy has been committed; though a commission has not issued. Then a subsequent statute(d) provided against the ruinous effect of the relation of the bankrupt laws, (which has been properly mitigated by the late act;)(e) in cutting down securities, by limiting the period between the act of bankruptcy and the commission, to five years. If a man pays money *after an act of bankruptcy, unless for the statute of King *James*,(a) he must pay it over again; and if he receives money, unless for the statute of *Geo*. II.(b) he must account for it. The exceptions prove the rule. The commissioners of their own authority may examine parties, and make them confess the infirmity of their title, and why may not the Lord Chancellor, administering the bankrupt laws; especially where the party comes in, as this party does, by the effect of the agreement I have stated, consenting to make the disclosure, and not pleading a purchase for valuable consideration without notice?

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(a) Stat 1 *Jac* I c 15. s 14

(b) Stat. 19 *Geo* II c 32

Authority of the commissioners and the Lord Chancellor in bankruptcy to compel a discovery even against a purchaser for valuable consideration without notice.

The mortgagee, therefore, ought to be paid the first mortgage only, and the rest must go to the assignees.

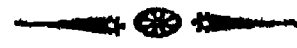
The Lord CHANCELLOR proposed that a bill should be filed; which, as the value was not considerable, was declined. On a subsequent day, some of the parties not being aware that judgment had been given, his Lordship went through the circumstances of the case again; repeating his clear opinion, that the case of *Collet* v. *De Golls* is not law, and concluding, that Lord *Eldon* and Lord *Redesdale* had expressed their opinions against that case.

(c) Stat. 13 *Eliz* c. 7. (d) Stat 21 *Jac.* I. c. 19. s. 14.
(e) Stat. 46 *Geo* III. c. 135.

The order was pronounced, that the sum of 85*l.* with interest from the 1st of *April* 1805, should be paid to *Watkin Morgan*, and the residue of the fund deposited subject to the agreement of the petitioners.

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ROLLS.

## *STURGIS *against* CORP.

*December* 8.

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A married woman considered as a feme sole as to property, settled to her separate use, whether in possession or reversion, and as such, therefore, may sell, if not particularly restrained by the instrument. Her consent on examination required only to waive her equity to have a settlement out of her equitable interest, not to pass her separate property.

BY deed-poll, dated the 15th of *March*, 1804, it was declared and agreed, that the trustees therein named, and the survivors, &c. should stand possessed of and interested in a sum of 4,000*l.* 3 *per cent.* consol. bank annuities, which had been frequently transferred into, and was standing in their names, and the dividends and annual proceeds thereof, upon the trusts and for the intents and purposes after declared, that is to say, after a trust to pay, apply and dispose of the dividends and annual proceeds, amounting to the sum of 120*l.* as and when the same should from time to time become due and payable unto *Ann Sturgis*, and her assigns for her life, from and after her decease upon farther trust, that they the said trustees, &c. should pay and apply the dividends and annual proceeds into the proper hands of *Martha Sturgis* for her sole and separate use, for and during the term of her natural life, and not to be subject or liable to the debts, controul, or engagements of her husband; and for which the receipt of *Martha Sturgis* alone, notwithstanding her coverture, should be a good and sufficient discharge; and from and after the decease of the survivor of *Ann Sturgis* and *Martha Sturgis*, then upon trust to pay, assign and transfer, the said sum of 4,000*l.* bank annuities, and all dividends and annual proceeds, if any such should then have accrued due for the same, unto *Joseph Sturgis* the younger, his executors, &c.

In *September*, 1804, *Joseph Sturgis* the elder, the husband of *Martha Sturgis*, purchased from his son *Joseph*

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*Sturgis* the younger, his reversionary interest in the bank annuities, after the death of *Ann Sturgis* and his mother, which was assigned accordingly by deed dated *the 6th of *September*, 1804. *Joseph Sturgis* the elder, and *Martha Sturgis*, put up the reversionary interest in the bank annuities to sale by auction, *Ann Sturgis* being still living; at which sale the defendant was declared the purchaser, and upon an objection taken by him to the title, the bill was filed by *Joseph Sturgis* the elder, and his wife, praying a specific performance of the contract.

The defendant by his answer suggested, that a proper assignment of the reversion could not be made to him without the private examination of *Martha Sturgis*, a married woman, who has an interest in the reversion, and ought to give her consent thereto in Court.

Mr. *Horne*, for the plaintiff, observed, that the attention of the Court had been recently drawn to this subject in the case of *Watts* v. *Dawkins*,(a) when, upon consideration of all the authorities before Lord *Thurlow*, the sale was established, upon the principle, that a married woman is, as to property settled to her separate use, a feme sole to all intents and purposes, if the instrument does not positively restrain her power of appointment or sale. This instrument has no restriction upon the limitation to the separate use of Mrs. *Sturgis*; and, the nature of the interest being reversionary, cannot make a difference.

(a) *Ante*, vol. 12. p. 501.

Mr. *Richards*, for the defendant, the purchaser, observed that the bill in this cause was filed before the decision of *Watts* v. *Dawkins*;(b) distinguishing this as the case of a reversionary interest, as to which the Court cannot take the consent, and mentioned *Richards* v. *Chambers*.(c)

(b) *Ante*, vol. 12. p 501. (c) *Ante*, vol. 10. p. 580.

*The MASTER of the ROLLS.

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Sturgis v. Corp.

Where property is settled to the separate use of a married woman, examination is not necessary. If the principle is that she is, as to that property, a feme sole, and has a disposing power, as such, she has as much a disposing power over her reversionary interest, as over her interest in possession. My opinion, therefore, is, that the property never passes by force of the examination; that she cannot pass any property by force of the examination, and the examination is of use only, as parting with the equity.

The decree was pronounced accordingly.



## EX PARTE KNOWELL.

*August* 19, 22. *December* 9.

Bankrupt being taken in execution, after the commission issued, the effect is an election, without regard to the particular motive.

THIS petition, to prove a debt under a commission of bankruptcy against *Mark Noble*, was resisted on the ground that the petitioners, *Knowell* and *Templar*, had, by taking the bankrupt in execution, after the commission had issued, made an election, and been satisfied their debt. The circumstances, under which the petitioners had taken that step, were, that the bankrupt having been called upon by the assignees to execute certain conveyances, hung back. He was at that time in confinement under mesne process at the suit of the petitioners, to whom the assignees applied, requesting them to make use of the power they had over his person, with a view to make him do that act. The petitioners consented; but, the time at which by the rules of the Court he would have been supersedeable, arriving before that object was attained, they took him in *execution, as they stated, merely with a view of procuring him to comply with that desire of the assignees. The bankrupt did afterwards execute the conveyances. He was still, however, continued in execution for a considerable * 193

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time, until he was discharged in due course; having obtained his certificate.

The *Solicitor-General*, and Mr. *Cooke*, in support of the petition.

The *Attorney-General*, Mr. *Perceval*, Mr. *Hart*, Mr. *Johnson*, and Mr. *Cullen*, for the assignees and the bankrupt.

The Lord CHANCELLOR.

The body being taken in execution, the debt is satisfied.

Creditor, having the bankrupt in execution at the time the commission issues, may elect.

Considering the bankruptcy out of the case, it is clear, that by taking the body in execution the debt is satisfied to all intents and purposes. If the debtor being in execution, becomes bankrupt, the creditor in reason and justice must have a right to elect; not having contemplated that event, which deprives him of the fruit of his execution. But when the commission has previously issued, and the creditor therefore takes his execution, apprised of the disposition to be made of the effects, and that there may be a certificate, and has his choice, that step upon the same reason must be an election; and, the debt is satisfied, whether by payment, or by having the body in execution is not material. This is the effect in general cases; and the claim of these petitioners to prove, must, therefore, be put upon the particular circumstances, upon which I am inclined to think they are not entitled to come in under the commission. The bankrupt was in confinement upon mesne process at their suit. Their representation is, that they wished to discharge him; but the assignees applied
* 194 to *them, wishing that he should remain in prison for an object not applicable to the bankrupt, but beneficial to the creditors. In consequence of that application he was detained in prison; but, when he became supersedeable by the rules of the Court, he had not done that act, for the purpose of doing which he was detained. There was no way then of forcing him to do that act required by the as-

signees, except by taking him in execution, which they did accordingly. If it stood there and they let him out, immediately as that act was done, the point would deserve consideration. But why did the petitioners keep him in execution two years after he had done that act, in *October*, 1804? That repels the presumption, upon which they contend that this was not an election. They never discharged him, for he was at length discharged only by the effect of the certificate. I have a strong opinion, that this debt cannot be proved: but I will look into the authorities.

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Ex parte Knowell.

The Lord CHANCELLOR. *December* 9.

I cannot permit this proof. The motive to an act, which when done, operates as a discharge, cannot give it a different effect. The authorities are decisive, and a case stated by Mr. *Cooke*,(a) goes this length; that when an agent without authority, and even without the knowledge of his principal, who was abroad, took the bankrupt in execution, that was an election. Upon this affidavit, however, after the deeds were executed by the bankrupt, they refused to discharge him; and he was at length discharged by the effect of his certificate.

(a) *Ex parte Warder*, 1 *Cooke's Bank. Law*, 132.

The petition was dismissed.



## *TWORT *against* DAYRELL. * 195

*December* 11.

Party may discharge his solicitor; who has a lien for his costs upon papers in his possession, but cannot, except by retaining them, prevent the progress of the cause, until he is paid.

A MOTION was made on behalf of a solicitor, who had been employed in this cause by the plaintiff, that the plaintiff and the other solicitor, who had been substituted by him, may be restrained from prosecuting, or taking

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any proceeding, in this cause, until the plaintiff shall have paid the former solicitor his bill of fees and disbursements.

Mr. *Bell*, for the plaintiff.

In *O'Dea* v. *O'Dea*(a) such an application was refused. The only person, of whom the Court takes notice, is the clerk in Court. In *Radcliff* v. *Roper*,(b) and *Taylor* v. *Lewis*,(c) the sixty clerks are recognized as the only attorneys of the Court. The reason, that a Court of law will not allow the attorney to be changed without leave, is the privilege, not of the client, but of the opposing party: the person upon whom notices and process are to be served.

(a) 1 *Schoale's & Le Froy's Rep.* p. 315 *Merryweather* v. *Mellish*, *ante*, 161

(b) 1 *P. Wms.* 410 *Francklyn* v. *Colhoun*, *ante* vol. 12. p. 2 *Shillabar* v. *Langdon*, *ante*, vol. 12 p. 3. note (a).

(c) 2 *Ves.* 111

Mr. *Owen*, in support of the motion.

In the Court of Exchequer, upon the law side, the party cannot change his attorney; though the attorney upon the record is the sworn attorney of the court. If the clerk in Court cannot be changed, which is admitted,
* 196 *a fortiori* the solicitor cannot be changed. The *clerk in Court merely copies instruments, hands them over, and gives notices: but the solicitor conducts the cause. The history of the six clerks' office is to be found in the case of the petition, *Ex parte the Six Clerks*.(a) It must now be taken, that a solicitor is immemorially an officer of this Court. In *Walmesley* v. *Booth*,(b) Lord *Hardwicke* states, that attorneys and solicitors, especially since the act of parliament 2 *Geo.* II. c. 23. have been considered as officers of justice, and they have stated fees allotted them, which they ought not to exceed; and therefore in all Courts, but more especially in Courts of Law, there are certain rules for regulating their conduct with regard to their clients. This Court holds the same strong hand over a solicitor, neglecting his duty, as a Court of Law

(a) *Ante*, vol. 3. p. 589.

(b) 1 *Atk.* 25. See page 27.

over an attorney. Lord *Eldon* held, that a solicitor going a certain length in a cause, shall not leave it there, but shall go on.

1806.

Twort v. Dayrell.

The Lord CHANCELLOR.

If the principle is considered, great confusion would arise from permitting the party to change his attorney, *ad libitum*, as often as he pleases; so that the Court could never know when the cause was legitimately before it. Hence arises the practice of the Courts of Law not to permit a party to change his attorney without a Judge's order; and then the Court provides, that the papers shall not be taken out of his hands without doing that justice, which his lien gives him, for due protection is to be given to the members of the Court. Such orders are perfectly familiar at law; but I am informed by the register(c) that there is no such instance in this Court. *How is that to be accounted for? The cases therefore at law and in this Court are not analogous. The party cannot take his papers out of the hands of the solicitor without paying his bill; and the probability is very strong, that the party cannot stir a step in the cause without the papers. The attorney trusts the client upon his personal responsibility; and has, as his security, an action and the lien. In this Court the Six Clerks were formerly the proper and the only attornies of the Court: but, the business increasing, they have had clerks established under them, the number of whom was finally limited to 60. The object of this motion is in substance an injunction, restraining any farther proceeding in this cause, until the bill of the solicitor shall be paid. I can venture to affirm, that there is no precedent for that.

At law, the party cannot change his attorney without a Judge's order.

Lien for costs upon papers in the attorney's possession.

(c) Mr. Crofts.

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The six clerks formerly the only attornies of the Court. Establishment of the 60 clerks under them.

The motion was refused.

1806.

December 9. 15.

## HAYE'S CASE.

Instructions to strike a docket received from the country on *Sunday* by a Solicitor; who before the bankrupt office opens on the following morning, receives similar instructions from another client. They must draw lots; as according to the course upon two at applications at the same instant.

THE Solicitor-General mentioned a difficulty, that had occurred in the bankrupt-office under the following circumstances. A Solicitor in *London* on *Sunday* received instructions from the country to strike a docket. The next day, before the office opened, he received instructions from another client to strike a docket against the same person. The question therefore was, whether the party, whose instructions were first received by the agent, was entitled to preference, there being no rule of practice applicable to such a case; or whether according to the course of the office, upon *different applications at the same instant, they must draw lots. The solicitor-general observing, that the same difficulty must arise if the same circumstance should occur upon any other holyday, suggested, that some direction should be given to the secretary of bankrupts upon the subject.

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December 15. The Lord CHANCELLOR directed, that in this instance the parties should draw lots; and that a rule should be drawn up accordingly for the future.(*a*)

(*a*) See the general order, post, 207

Nov. 27. Dec. 6. 15. 17.

## PERRY *against* BARKER.

After foreclosure and sale, action by the mortgagee for the balance opens the foreclosure. Therefore the mortgagee should have time to get back the estate and tender a reconveyance, and the mortgagor to redeem.

But the mortgagee having taken possession a considerable time ago, and the balance being considerable, a perpetual injunction was decreed.

THIS cause(*a*) came on to be heard. The defendant, a mortgagee of a term of 500 years, to secure the sum of 800*l.* and interest, by indentures, dated the 27th of *April*, 1790, with the usual covenants, and a joint and several

(*a*) See the report upon the motion for an injunction, ante, vol. 2. p. 527.

bond by the plaintiffs, the mortgagors, in *Hilary* Term, 1797, filed a bill of foreclosure. Upon the 1st of *February*, 1798, the usual decree was made. The Master's report, dated the 14th of *May*, ascertained the sum due to be 909*l.* 18*s.* 5*d.* In *July*, the mortgagee took possession. Upon the 15th of *November*, 1798, the decree of foreclosure was made absolute. In *February*, 1799, the mortgagee sold the estate by auction for 800*l.* and afterwards brought an action upon bond for 135*l.* 8*s.* 3*d.*; with interest from the 28th of *June*, 1799, when the sale was completed. The bill was filed in 1803; praying a redemption, and an injunction; or, that the defendant may be decreed *to have elected to take the premises in satisfaction of his demand; and may in that case be decreed to deliver up the bond, and be forever restrained from proceeding against the plaintiffs. * 199

The *Solicitor-General*, Mr. *Alexander*, and Mr. *Martin*, for the plaintiffs.

The question is, whether a mortgagee, having obtained an absolute foreclosure, by which the estate is become his property, can afterwards sue upon the principle, that there is a subsisting loan. A mortgage of an estate is at law an absolute sale; provided the day appointed for payment is past. Until that period an option, whether it shall be a sale or a loan, remains with the mortgagor. If Courts of Equity had not interfered, relieving the mortgagor after the day was past, the mortgagee would never have been permitted to enforce the covenants for payment of the debt, or any collateral security. This gross injustice would be the consequence. The mortgagee, though considered as the purchaser of the estate, would be permitted to recover the whole money by putting the bond in suit; and the effect would be that he would get the estate for nothing; with reference to the mortgage considering the estate his own; with reference to the bond treating the transaction as a loan.

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Perry v. Barker.

Will the redemption given in this Court, make any variation? When a Court of Equity says to a mortgagor, he cannot now have relief; that he has had all the time that can be allowed to him, his situation is as if there was no equitable jurisdiction. That is the precise state of this case. The principle, upon which the legal right under the instrument is restrained, that the mortgagee is become
* 200 the purchaser of the estate, *applies equally to a part of the consideration as to the whole. It would be equally inconsistent with equity to permit a part to be recovered. It is true, in equity a mortgage is considered merely as a security for a debt, but that is true as long only as the power of redemption remains. The proposition is, that the bond cannot be put in suit without making it again a mortgage; and then the foreclosure is opened, and the right of redemption revives, *Dashwood* v. *Blythway*.(a) The consequence certainly is, that the mortgagee, permitting that and waiving his foreclosure, is entitled to proceed in the action, but he cannot at the same time insist, that the estate is absolute in him, and also that the money forming the consideration is a loan. Cases of the most enormous injustice may be put, for instance, that the estate would produce much beyond the amount of the debt, yet upon this argument, the mortgagor could not have had redress. The case of a sale for less than the debt must be considered also with reference to the principle, that a trustee must sell in such a mode as not to derive any benefit to himself. The mortgagee, having the whole controul over the sale, is bound to sell, so as to liquidate the debt due to him if possible.

(a) 1 *Eq. Ca. Ab.* 317.

The only case, that has raised a doubt upon this, *Tooke* v. *Hartley*,(b) does not amount to a decision. The defendant's counsel admitted all that is now contended, that the foreclosure was opened. Lord *Thurlow* intimates an opinion, that the mortgagee had a right to proceed in the action; but does not say the consequence is that he has a right to keep the estate. The effect of opening the fore-

(b) 2 *Bro. C. C.* 125 Cited also by the Solicitor General from his own note.

closure is, that the *right of redemption revives, and the mortgagee having sold the estate, must either get it back so that the mortgagor may redeem, or must be considered as having elected to take the estate. The foreclosure cannot be opened to one effect, and not to another. If the mortgagee chooses to consider the estate as a pledge, it must have that nature throughout. Until the case of *Took* v. *Hartley*,(a) the general understanding was, that a mortgagee taking the pledge to himself, took it in satisfaction of the debt, otherwise numerous instances must have occurred. The advantage would be by no means mutual; on the one side, the mortgagor by a foreclosure losing the estate, whatever may be the value; on the other, the mortgagee having a value set upon it, and proceeding for the difference. The principle must be, that if the creditor chooses to proceed upon his personal securities, the estate must be a pledge; but if it is not longer a pledge; if he has made it incapable of being so treated, the debt must be considered satisfied.

(a) 2 *Bro. C. C.* 125.

Mr. *Richards*, and Mr. *Heald*, for the defendant.

Though the estate is sold, the mortgagee is entitled to proceed upon the bond. The distinction of *Took* v. *Hartley*(b) is, that the mortgagee had himself bought in the estate, and therefore had the power of restoring it. But Lord *Thurlow's* opinion as represented by Lord *Eldon*,(c) is in favour of the mortgagee, and is founded upon the law of this Court. The transaction is a loan. The bond is a natural security; the mortgage only a collateral security; generally with a covenant for payment of the money. At law the effect of a mortgage is a conveyance upon condition; and, when the *condition is broken, the estate becomes absolute, the mortgagee is a complete owner; and there is an end of the relation of mortgagor and mortgagee. Might not the mortgagee bring an action if the estate had been destroyed; if a house for instance, had been burned? No defence could in that case be made at law. Recourse * 202

(b) 2 *Bro. C. C.* 125.

(c) *Ante*, vol. 8. p. 531.

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Perry v. Barker.

must be had to equity, which says the estate is only a pledge; and this Court relieving against breach of condition, and giving effect to the real transaction, permits redemption within a given time. Notwithstanding a decree of foreclosure, the debts remain unsatisfied. The decision, that the foreclosure is opened, proves only that the estate must be brought into the account; but if the pledge is not sufficient to pay the debt, the creditor may resort to his other securities. The Court by confining a person, who contracted for two securities to one, would commit great injustice. The advantage is too much in favour of a mortgagor; who though he can stop the suit upon a bill of foreclosure *in limine*,(a) is by the indulgence too liberally granted, in addition to the necessary delay in the usual course of proceeding, furnished with the means of keeping the mortgagee out of his money, at the hazard of all the inconvenience, and even the ruin that may be the consequence. This opinion was often expressed by Lord *Eldon*.

(a) Stat 7 Geo II c 20 s 2 *Huson* v *Huson*, *ante*, vol 4 p 105 *Bustard* v *Clarke*, *ante*, vol 7. p. 489.

The *Solicitor-General*, in reply.

The admission that the foreclosure is opened by the action, with the consequence, that the right of redemption revives, decides this case; amounting to this, that the mortgagee cannot proceed to recover his debt without restoring the estate; which in this instance he *cannot do. He cannot put up the estate to sale, before he decides whether he will consider it as a pledge or not. He cannot determine upon the event. The affirmative of that proposition, extremely difficult to be maintained, must be be made out by the plaintiff. The mortgagee is at least bound to give notice to the mortgagor of his intention to sell; especially if he proposes a sale by auction, which may not go near the value. He must give notice, that he means to sell as a trustee, and put it out of his own power to take the surplus. But, even supposing such notice given, that he will sell as a trustee, accounting for the surplus, and making the mortgagor answerable for the deficiency, the Court would not permit him to have a compulsory sale

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under the decree. He may have a foreclosure; but cannot have a sale without the consent of the mortgagor. The decision of *Took* v. *Hartley* cannot bear upon this case. According to my note, that extrajudical opinion, alluded to by Lord *Eldon*,(a) appears to have fallen from Lord *Thurlow*, and without any reason. The reason upon which Lord *Thurlow* would have granted the injunction, must have been, that the estate was capable of being restored. In this case the Court must interpose; for it is only the equity, that prevents the recovery of the whole money; and then the Court upon its general principles will not permit a man to consider himself a trustee for another, merely as it is so advantageous to him to consider himself; admitting, that otherwise he would not be a trustee. It rarely happens, that a mortgaged estate is not equal to the money; and generally a mortgagee takes a conveyance with a power to sell. Though the mortgagee is liable to some disadvantage, he may have great advantage. He may sustain some loss: but *he may also receive great profit. He knows the nature of the contract, into which he enters, and is aware of the incidental advantage and disadvantage. * 204

(a) *Ante*, vol. 8. p. 531.

The Lord Chancellor.

The importance of the subject, and the opinion, which, as Lord *Eldon* has distinctly stated his conception of it, I shall consider as Lord *Thurlow's* opinion, justify me in pausing upon this case. My opinion at present inclines to a middle course; that though, when a mortgagee has obtained a decree of foreclosure, the estate is his, if he will bring an action, he shall give the mortgagor an opportunity to redeem; and the true equity and justice of the case seem to be, that the foreclosure is opened by the action; but there must be some mode of bringing forward the mortgagor; giving him notice that he may redeem; or the mortgagee previously acknowledging, that he is a trustee.

1806

Perry v. Barker.

December 16

The Lord CHANCELLOR.

I continue of the opinion I expressed, which is confirmed by an opinion of Lord *Redesdale*. As I think, the foreclosure is opened, and the sale was so long ago as 1799, and the defendant's demand is so inconsiderable, it is scarcely possible, that he should seek to put himself in circumstances, that would allow the mortgagor to redeem; the consequence of which would be, that the mortgagee must account for the rents and profits, as if no sale had taken place; but he had continued in possession. Under these circumstances, therefore, I think the best decree will be to make the injunction perpetual.

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*I ought not, however, to do that without observing, that I am not sure whether the embarrassment upon this subject has not arisen from this; that the Court in one respect does not act altogether up to its own principle in the case of a mortgage. The mortgagee takes a double security; the personal covenant of the mortgagor, and usually a bond also, and a pledge of the estate. If before he files a bill of foreclosure, he sues upon the bond, or brings an ejectment, the Court will not stop any of his remedies. But if he files a bill of foreclosure, and the mortgagor is unable to procure the money, the estate, whatever may be the value, is gone. Is it not extraordinary, then, that he should have the advantage both ways; that, foreclosing he shall keep the estate, though of much greater value; but, if it is a scanty security, he shall recover the difference? What I mean by presuming to say, the Court has not acted up to its principle, is this; that perhaps instead of a foreclosure, a decree for sale of the estate would be more analogous to the relative situation of lender and borrower; and, I am informed by Lord *Redesdale*, that such is the course in *Ireland;* a decree for sale instead of a foreclosure; and if the sale produce more than the debt, the surplus goes to the mortgagor; if less, the mortgagee has his remedy for the difference.

The course in *Ireland* is a decree for sale, instead of foreclosure; the mortgagor having the surplus, if any: the mortgagee his remedy in case of deficiency.

In this instance, if there was any probability that this mortgagee could get the estate back again, he ought to have a time limited for that purpose; then he ought to tender a conveyance, and the mortgagor should have a given time to redeem; but under the circumstances of this case, the mortgagee's demand being so inconsiderable, the proper decree is an injunction. I shall not give costs, as there has been a doubt upon the subject.

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## *EX PARTE GREENING.

* 206

June 13

Indorsement after bankruptcy of a security, delivered to a creditor previously, valid.

A PETITION was presented by a creditor of a bankrupt, praying that the bankrupt, or his assignees, may be ordered to indorse a promissory note, made payable to the bankrupt or order; which the bankrupt had previously to his failure delivered to the petitioner as a security for part of his debt, but not indorsed.

Mr. *Cooke*, for the assignees, did not oppose the petition; but objected, that the bankrupt's estate should not be burthened with the costs.

Mr. *Treslove*, in support of the petition, cited *Smith* v. *Pickering*,(a) in which Lord *Kenyon* decided, that under such circumstances an indorsement by a bankrupt after his bankruptcy was valid, and contended, that as the bankrupt was competent to indorse the note, the petitioner ought not to have been put to the necessity of this application, and was therefore entitled to his costs.

(a) 1 Esp. Dig. 80.

The Lord CHANCELLOR said, the security without the indorsement was only a piece of useless paper; and allowed the costs.

# GENERAL ORDER IN BANKRUPTCY.

DECEMBER 29, 1806

General order in bankruptcy as to striking a docket and sealing a commission.

IT IS ORDERED, that from henceforth no docket shall be struck but between the hours of 10 o'clock in the morning, and 2 o'clock in the afternoon, and between the hours of 6 and 8 o'clock in the evening; and that in case two or more persons shall apply at the same time to strike a docket against the same person, and both of them shall be prepared to issue a commission forthwith, then that it shall be determined by lot which person shall issue such commission; but in case only one of such persons shall be then prepared to issue such commission, then that the commission shall be issued to the person who shall be so prepared. Provided, that any person applying to open the office upon a holiday, (other than upon a Sunday,)(*a*) may be at liberty so to do upon payment of a fee of one guinea to the clerk who shall attend at the office, to open such office and to enter a docket in the docket-book. And that no docket shall hereafter be considered as struck, until the same shall be entered in the *docket-book, to which docket-book all Solicitors of the Court of Chancery may, during the hours aforesaid, have free access, upon payment of the usual fee of one shilling, and the fee of one guinea for opening the office, in case such docket-book shall be searched upon a holiday. And it is further ordered, that in case any person who shall hereafter strike any

(*a*) *Haye's case, ante,* 197.

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docket, shall not within four days next after such docket shall be struck, order a commission to be sealed at the then next public seal, in case there shall be a public seal within seven days next after such docket shall be struck, or by a private seal within eight days after the striking of such docket; and, shall not cause the same to be sealed accordingly, then that any other person may be at liberty to sue out a commission, without any notice given to the person who shall first have applied for such commission. 1806.

ERSKINE, Ch.

END OF THE FIRST PART

# CASES IN CHANCERY.

THE SITTINGS AFTER MICHAELMAS TERM,

47 GEO. III. 1806.

## THELLUSSON *against* WOODFORD.

## WOODFORD *against* THELLUSSON.

*July* 21, 22
*December* 6

Will, directing, that, in case the testator shall enter into contracts for the purchase of lands, and die before the conveyance, such contracts shall be carried into execution, and the money paid out of his personal estate, and the conveyance be to his trustees, their heirs, &c. to the uses of his will. The heir at law, having interests bequeathed to him, put to election.

THE will of *Peter Thellusson* dated the 2d of *April*, 1796, devising all his estates, manors, &c. at *Brodsworth*, and other places in the county of *York*, and all the messuages or tenements, lands, hereditaments, or premises, for the purchase whereof he had entered into any contract or contracts in writing, with the benefit of such contract and contracts respectively, and all other his real estates, whatsoever and wheresoever, to the use of trustees, their heirs and assigns, upon the trusts after mentioned, contained the following clause :

" In case I shall in my life-time enter into any contracts " for the purchase of any lands, tenements or hereditaments, " and I shall happen to die before the necessary conveyan- " ces thereof are executed, I order *and direct, that all " and every such contract or contracts so entered into by " me as aforesaid, shall be completed and carried into ex- " ecution by my said trustees after my death, and that the " purchase-monies for such respective estates and premises

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" shall be paid by them, by, with, and out of my personal " estate and effects, and that the deeds and conveyances " thereto respectively, shall be made to them, their heirs " and assigns; and, that they and every of them, shall " stand, remain, and be seised, and possessed, of all and " singular the premises so to be conveyed upon, under, " and subject to such, and the same uses, trusts, limita- " tions, provisoes, and conditions, as are in and by this " my will, created, expressed, and declared, of and con- " cerning the estates hereby directed to be purchased, by " and with the aforesaid residuum of my estate and " effects, in the manner herein before mentioned."

The testator within a month before his death, had contracted for the purchase of real estates to the amount of 30,000*l.*

The bill filed by the trustees, prayed, that the trusts of the will may be established, and that it may be declared, whether *Peter Isaac Thellusson*, as heir at law of the testator, is or is not entitled to such parts, or particulars of his real estate, as were conveyed to him after making his will; and also to such particulars of his real estates as were purchased, contracted, or agreed to be purchased by the testator after making his will, and to have such of the said contracts as remained unperformed at his decease completed for the benefit of his said heir at law, and to have the purchase-money paid out of the personal estate of the testator; and particularly, that it may be declared *whether the heir is entitled to such last mentioned real estates, and also to the legacies and bequests in the will; and if not, then that he may be put to his election. * 211

The decree, dismissing the bill filed by the widow and children of the testator, as far as it sought to have the trusts of the will declared void, and establishing the will, giving directions for carrying the trusts into execution, and declaring a trust, as to the estates contracted for by

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the testator after the date of his will, for the heir, reserving the question, whether he would be entitled to the personal bequests, having been affirmed by the House of Lords upon appeal,(a) the question of election was brought forward upon the petition of the trustees.

(a) See the Reports, *Thellusson* v. *Woodford*, *ante*, vol. 4. p. 227. vol. 11. p. 112.

Mr. *Martin*, and Mr. *A. Buller*, for the petition; the *Attorney-General*, for the trustees, and for the crown; Mr. *Alexander*, for the grandchildren.

Though no authority upon the subject of election appears to apply precisely to this case, the principle is clear. From the period of *Noys* v. *Mordaunt*,(b) the earliest case, the rule has prevailed universally, that a man shall not take a benefit under a will, or any other instrument, and at the same time disappoint the provisions of that instrument. It applies to persons of every description, however favoured: wife, heir at law, or by custom, issue in tail, &c. The reason upon which it has been considered as not applicable in certain cases, is that the Court had not before it legal and proper evidence, that the legatee was by his *claim disappointing the testator's intention; and those cases are not inconsistent with the rule. Those cases forming exceptions to the rule, are principally of this sort: an attempt to devise real estate by an unattested will; giving personal benefits to the heir. In such a case, it is admitted, the heir is not put to elect; but the reason is, that the Court has not before it the intention, upon which a case of election may be raised. If a legacy is bequeathed to *A.* in consideration that he shall convey an estate to *B.* there is no occasion to look farther than to the personal legacy; a condition being expressly annexed to it, which must be complied with. But that is not the form in which the case of election usually appears. There is generally no express condition: but a condition is by implication considered as annexed to the legacy. If a legacy is bequeathed to *A.*; and *A.'s* real estate is, by a codicil duly attested, given to *B.* that codicil cannot pass that estate,

(b) 2 *Vern.* 581.

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but it will raise a case of election; and if he elects to keep his estate, satisfaction must be made to the devisee, as far as he is disappointed, out of the legacy. But, if the codicil is not attested according to the statute of frauds,(a) there is not a case of election; the statute not permitting the Court to look at the codicil unattested, with reference to real estate. The effect is, not only that the attempt to dispose is ineffectual, but that the Court cannot look at the instrument as evidence of the intention to devise real estate.

(a) Stat 29 Car. II. c 3

There is no substantial difference between that and the case of one instrument, containing both the legacy and the devise. The same instrument is frequently for different purposes read and refused; a probate for instance, is read as to the personal estate, not as to real *estate. It is considered, as if what relates to that, was struck out. Therefore, in the case of *Rich* v. *Cockell*,(a) the husband was not put to his election; the Ecclesiastical Court having refused probate of that instrument, by which an attempt was made to give to a stranger, that which was the property, not of the married woman, but of her husband. The principle is precisely the same as that of an heir, claiming against an unattested will; the election failing in both cases for want of authentic evidence of the intention. * 213

(a) *Ante*, vol. 9 p 369

There is considerable force in the objection, that the Court may read the will for the purpose of getting at the intention; confining the operation of the statute to the effect of the instrument. But that distinction is not supported by the authorities. Lord *Hardwicke* clearly went upon this; that the Court could not look at the instrument. *Hearle* v. *Greenbank*(b) is the first case of that kind; and the subsequent case, of *Boughton* v. *Boughton*,(c) contains the best commentary upon it. Lord *Hardwicke*, the former case being pressed upon him, takes the distinction, that, as the will then before him contained an express condition, there was enough to raise the case of election, but in the other case there was nothing to shew that the

(b) 1 *V*. 293 3 *Atk* 695
(c) 2 *Ve*. 12.

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real estate was devised; as no legal evidence of that intention was before the Court. The distinction, that the will cannot be read, that a will unattested is not evidence as to real estate, is sensible, and does not break in upon the general rule: to which there is no exception, that does not proceed upon the circumstances, that the instrument is not in evidence before the Court. That distinction is followed by Lord *Eldon*, in *Sheddon* v. *Goodrich*,(d) and **Rich* v. *Cockell*.(a) The inclination of Lord *Hardwicke* not to confine the rule, and to apply it, wherever it can be applied, is apparent; for there is strong reason to say, the case of *Boughton* v. *Boughton* is within *Hearle* v. *Greenbank*.

(d) Ante, vol 8 p 481 See page 496

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(a) Ante, vol 6. p. 569.

In this bill the intention is perfectly clear. The testator has declared it in express terms. The disposition fails for a reason different from, and having no analogy to, that by which it was defeated in the other cases, to which the doctrine of election was not considered applicable. Ever since the case of *Bunker* v. *Cooke*,(b) the law has been established, that real estate, purchased after the execution of a will, cannot pass by it: whether upon the principle, that a devise has the nature of an appointment, or upon the construction of the statute of wills,(c) is different for this purpose. The objection is, that these estates cannot pass by the devise: neither can an estate tail: nor a copyhold estate, unsurrendered:(d) nor the estate of another person: yet all these have been held cases of election. The want of power in the devisor is not merely immaterial: that raises the election. If a legacy of 10,000*l.* is given to *A.*, and *A.'s* estate is devised to a stranger, that is a clear, acknowledged case of election; the effect being through that medium a purchase of *A.'s* estate. Why is not that the effect of this will? What substantial difference can be stated? So, in *Lady Cavan* v. *Pulteney*,(e) a devise in very general terms, the heir in tail was put to election. Suppose, a recovery had been suffered, under which the same person would *have been entitled to the fee-simple by descent: can any intelligible distinction be stated, upon

(b) Fitz 225. Holt, 236 See ante, vol 2 p. 427.

(c) Stat. 32 Hen VIII c 1 Stat. 34 Hen VIII. c. 5

(d) Blunt v. Clitherow, ante, vol. 10 p. 589 and the references.

(e) Ante, vol. 2 p. 544 vol. 3, p. 384.

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which in one case the heir in tail should, and in the other the heir at law should not, elect? As to the copyhold estate, not surrendered, the will is as ineffectual as this will is as to the after-purchased estates: yet that also is, without doubt, a case of election.

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The *Solicitor-General*, Mr. *Perceval*, and Mr. *Bell*, for the heir at law.

No instance can be produced of a person, compelled upon the doctrine of election to give up a freehold estate, which he takes as heir at law. That point will now be decided for the first time. The clause of the will, upon which this question arises, is very peculiar; an attempt to devise estates, for the purchase of which the testator shall have contracted, and that shall remain under the contract at the time of his death; so, that if these contracts had been executed, and the estates conveyed to the testator, his heir would have been clearly entitled both to these estates, and to the personal interest bequeathed to him. The distinction taken upon the expression of Lord *Hardwicke*, not in the statute, that the will cannot be read as a devise of real estate, but may be read to shew the intention, in this instance as to the after-purchased estates, is not substantial. All devises of real estate depend upon the statute. By the common law no man could devise, except by custom; the common law regulating those particular cases. By the statute of wills,(*a*) a man cannot devise lands of which he is not seised, which is the construction put upon the expression of the statute, "*having*." The first statute 32 *Hen.* VIII. does not except infants; but they are by the subsequent *statute made incapable of devising real estate. With reference to the statute of frauds,(*a*) there was as much reason for restraining the power of devising after-acquired estates, as for guarding against devising, not in the form prescribed by the statute;

(*a*) Stat. 32 *Hen.* VIII. c. 1. Stat. 34 and 35 *Hen.* VIII. c. 5.

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(*a*) Stat. 29 *Car.* II. c. 3.

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as the effect might be to pass more than the testator intended. But what is the distinction of the case of an infant? Why may not the Court in that case look at the will for the purpose of collecting the intention. The only reason is, that the law does not permit a devise by an infant. Neither does it permit a devise to pass lands afterwards acquired.

The case of *Boughton* v. *Boughton*(b) is not a case of election. That is a case of construction upon a condition expressed, falling under another consideration, and to be determined upon a different principle, and different reasons, from those upon which the case of election depends, which always arises upon an implied condition. The former involves only two considerations; 1st. Whether a condition is annexed; 2dly. Whether it is legal. In *Boughton* v. *Boughton* the will was not duly executed; but effect was given to the condition, as it was expressed; and in *Sheddon* v. *Goodrich*,(c) and all the other cases, the distinction between an express and implied condition is acknowledged. Probably the case of a man, devising the estate of another person, knowing that, has never occurred; but the testator has, in such cases, from mistake, supposed he was disposing of his own estate. Supposing him to know the estate was the property of another, perhaps the doctrine of election would apply to that case; but the distinction, always taken, is between conditions express *217 *and implied. In *Sheddon* v *Goodrich*, Lord *Eldon* proceeds upon that distinction, and cites the case of *Carey* v. *Askew*,(a) in which Lord *Kenyon* considered it so well established as to bind the Court, though he could not assent to the reason of the doctrine, stating that it was very difficult to discover the distinction between the cases, *Hearle* v. *Greenbank*,(b) and *Boughton* v. *Boughton*;(c) and his lordship was so little disposed to carry that distinction farther, that he expressed his opinion, that the former decision is the better of the two. Lord *Eldon* also expresses

(b) 2 *Ves.* 12.

(c) *Ante*, vol. 8. p. 481.

(a) Stated by the Solicitor-General from his own note.

(b) 1 *Ves.* 298. 3 *Atk.* 695.

(c) 2 *Ves.* 12.

his disapprobation of that distinction; but considers it established.



The objection in those cases was, that the will, not being attested by three witnesses, could not be read as to the real estate. Upon what ground can this will be read? The objection in both cases is, that the man is not permitted by law to make such a disposition. The will must first be read, and then the fact *dehors* the will is shewn: in the one case, that the party was an infant; in the other that there are after-purchased estates. In the case of revocation of a devise by tenant in tail, the effect of a recovery suffered, why should not the heir equally be put to election? In that instance also the will cannot operate upon the estate. As to the case of copyhold estate, the heir is put to elect upon very different principles. This Court is in the habit for certain purposes of dispensing with form; supplying in favour of creditors, a wife or children, the want of surrender. The will is a complete and perfect instrument to operate upon the estate, and the precedent form of a surrender alone is wanting, in respect of which defect, relief is *given. But the forms prescribed by the statute of frauds,(a) and the republication of a will after a purchase, have never been dispensed with. * 218

(a) Stat. 29 *Car.* II. c. 3.

Mr. *Martin*, in reply.

All these cases of election depend upon what is stated by Lord *Talbot*, in the case of *Streatfield* v. *Streatfield*,(b) that, where a man takes upon himself to devise what he has no power over, upon the supposition that his will will be acquiesced in, this Court compels the devisee to take entirely, not partially, under it, as in *Noys* v. *Mordaunt*,(c) there being a tacit condition annexed to all devises of this nature, that the devisee does not disturb the disposition of the devisor.(d) The principle however is much broader, and not limited to a condition, either expressed, or implied; *viz.* that it is against conscience, claiming the benefit

(b) *For.* 176.

(c) 2 *Vern.* 581.

(d) This does not go farther than compensation. See the note (g) *ante*, p. 171. *Judd* v. *Pratt*.

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of an instrument, to set up a legal right to disappoint the claims of other persons under the same instrument. Almost all these cases proceed upon want of power in the testator; for which reason the will is inoperative, either from the want of interest, as in the instance of a tenant in tail, and a copyhold, or from a defect in the execution, or incompetence of the testator. In the two last cases the Court cannot look at the instrument, with the exception of the case of express condition, *Boughton* v. *Boughton*.(e) In *Hearle* v. *Greenbank*,(f) the infant affected to give, not property that was not *her own; but her real estate; and the ground taken by Lord *Hardwicke*, was, that in no instance could the Court look at the will of an infant as to real estate; an infant being by the statute placed in the same condition with reference to that, as a lunatic, and the will of the former as to real estate equally inoperative. An infant had not under the first statute(a) the capacity to devise. The general words of the act must be construed all persons competent; and in *Dyer* v. *Hobart*, referred to in *Ruffhead's* edition of the statutes, it is laid down, that an infant never could have devised.

(e) 2 Ves. 12.

(f) 1 Ves. 298. 3 Atk. 695.

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(a) Stat 32 Hen. VIII. c. 1.

The case of an express condition annexed by a party competent to dispose, and doing the proper act for that purpose, is not a case of election, the equity proceeding upon this, that the disposition made by the will in effect requiring the party taking under it to conform to that disposition, a condition is implied. In the case of an infant there is positive incapacity; and, therefore, the Court cannot look at the instrument. But it is competent to a man, having a view to acquire property, to annex a condition to a disposition in favour of his heir, that he shall give effect to the general disposition of the will. It does not appear in a general devise, that any land was acquired after the date of the will. The will, being duly executed to pass real estate, is read for the purpose of collecting the intention; and if it appears that any land was acquired afterwards, the heir upon the general rule must

elect. In the case of the copyhold the testator has not, as he might, acquired a right to act upon it. The intention is in this will as strongly indicated, as if the testator had in express terms called upon his son to give effect to *these contracts; and no precise form of words is necessary. The heir, insisting upon his right, will defeat that disposition which the testator has attempted, but had not power to make effectual. This is, upon the whole, one of those cases in which the Court, seeing the clear intention from the disposition made by the will, opposes the doctrine of election to the exercise of a right, that must defeat the disposition.

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The Lord CHANCELLOR.

*December* 15.

The prayer of the bill, filed by the heir at law, with reference to this point, is in effect, that the personal estate of the testator shall be applied to the completion of these contracts, directed by the will to be carried into execution, for the benefit of the heir; and that he in opposition to the will may take as heir those estates so contracted for; and the trustees may stand seised to his use, instead of the uses of the will. I give the judgment, which I find myself bound to give, with some reluctance, considering this will as dictated by feelings not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdiction, exercised by this Court compelling election, may be thus described. A person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can. If, therefore, a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving

Election. A person shall not claim an interest under an instrument without giving full effect to it, as far as he can; renouncing any right or property, which would defeat the disposition.

The ground is the implied condition, upon intention; though from mistake.

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to that person an interest by his will, that person *shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition, that he shall not take both; and the consequence follows, that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator.

This is the proposition. But it has been said, that, when a testator by his will attempts to give that which is not his property, but which he supposes to be his, forming his different dispositions upon that mistake, *non constat*, what he would have done had he been aware of the true state of the circumstances. The best answer to that was given by Lord *Alvanley* in the case of *Whistler* v. *Webster*,(a) that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to every thing contained in it, whereby any disposition is made, shewing an intention that such a thing shall take place, without reference to the circumstance, whether the testator had any knowledge of the extent of his power, or not; nothing can be more dangerous than to speculate upon what he would have, if he had known one thing or another; it is enough to say, he had such intention; and the Court will not speculate upon what he would have done in the different cases put; if the instrument is such as to indicate, what the intention was, the only question is, did he intend the property to go in such a manner; not whether he had power to do so, and would have done it, had he known he could not without a condition imposed upon another person; whether he thought he had the right, or, knowing the extent of his authority,
*222 *intended by an arbitrary execution of power to exceed it, no person, taking under the will, shall disappoint it.

(a) *Ante*, vol. 2. p. 367. See pages 370, 371.

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In every case of election there must be an intention to dispose of that over which that person has no power of disposition. That is the circumstance that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived, that under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will; but the testator, not being aware of that, gives considerable interests to his heir; but gives those interests under the conception, that the whole property and arrangement were subject to his controul; and upon that ground the principle of election must prevail.

In *Noys* v. *Mordaunt*,(*a*) the testator imagined he had power over the estate; which was in settlement; and the Lord Keeper put the decision upon the implied condition. That case was followed by *Streatfield* v. *Streatfield*,(*b*) and several cases, down to *Sheddon* v. *Goodrich*.(*c*) The difficulty upon a plain, simple principle first occurred in the case of *Hearle* v. *Greenbank*,(*d*) but I do not apprehend, that this case will be embarrassed by that decision. Lord *Hardwicke* held, that the act of the infant had no effect; that there was no disposition as to the real estate; and therefore a case of election did not arise.

(*a*) 2 *Vern.* 581.

(*b*) *For.* 176.

(*c*) *Ante*, vol. 8. p. 481.

(*d*) 1 *Ves.* 298. 1 *Atk.* 595.

*This is the case of a man having a clear right to dispose by will both of his real and personal estate: but his disposition fails as to these real estates by his ignorance of the distinction, that a will of a subsequent date was necessary. There is, therefore, as in the case of *Hearle* v. *Greenbank*,(*a*) no will, that can touch these real estates. As to the case of a devise, with two witnesses only, the intention is * 223

(*a*) 1 *Ves.* 298. 3 *Atk.* 369.

(b) 2 *Vern.* p. 581.

The only instances of limiting the principle of election, are an attempt to devise by a will not duly executed: 2dly. An attempt to devise by an infant.

as plain as in *Noys* v. *Mordaunt*:(b) why then should not the Court say in the former case, the intention is clear; but cannot as to the real estate have legal effect, from the omission of a third witness, by mistake; as in the other case the devisor attempts through mistake to devise an estate, which is in settlement, or belongs to another person. The opinion of Lord *Hardwicke* I take to be this. A devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act without the evidence of three witnesses. If not so proved, it is nothing: it cannot receive notice. The intention cannot be represented; for it cannot be presumed, and there is no evidence; the will, not being executed with the solemnity prescribed by the law as to real estate, cannot be read: the Court cannot see any devise of real estate; and therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, as in this case the act does appear to be done by Mr. *Thellusson*, the heir cannot in that case be put to election.

(c) 1 *Ves.* 298. 3 *Atk.* 695.
(d) Stat. 32 *Hen.* VIII c 1. 34 *Hen.* VIII. c. 5.
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The case of *Hearle* v. *Greenbank*(c) stands upon the same ground: an infant under the statute(d) not having *a right to dispose of real estate. The Court cannot look at the will. It is, from the incapacity of the person who frames it, considered as no instrument.

These are the only instances, in which the principle has been limited. It cannot be argued, that it does not reach an heir at law. Lord *Hardwicke* would not put the case of an heir at law by way of illustration, if the heir could not under any circumstances be put to election.(a) The

(a) The case of a devise to the heir of an estate, which he would have by descent, if no will was made, and to another person, of an estate, of which the heir is seised in his own right, is put by Sir *Samuel Romilly*, (*ante*, vol. 9. p. 364. *Rich* v. *Cockell*,) as said to be a case of election. Mr. *Sugden* (law of vendors and purchasers of estates, ed. 2. 128—9. note 3.) has found a precise decision of the point, accord-

principle of election is plain and intelligible; that if a person, being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition. Mr. *Thellusson's* heir takes these estates, as if his father had not made a will; but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect.

ingly against the heir, *Anon. Gilb. Eq. Rep.* 15. In that instance, it may be observed, the heir took not under the devise, but by his better title, descent. The devisor however, devising the estate to him, must be conceived to be aware of his power to devise it away; and the condition was accordingly implied.

## *ALLEY *against* DESCHAMPS.

* 225

*November* 27
*December* 18.

Bill for specific performance of an agreement dismissed upon the lapse of time without proceeding in the performance.

CRICHTON HORNE, being in 1794 possessed of leasehold premises in *London* for the residue of a term of 99 years, commencing in 1792, with a view to a partnership, to be entered into between him and *John Deschamps*, junior, one undivided moiety of the premises, consisting of a glass-house, with the fixtures, utensils, &c. was in consideration of 1,430*l.* assigned to *John Deschamps*, senior, for the residue of the term; and he and *Horne* demised all the premises to *Peter Mellish* for 14 years, at the yearly rent of 50*l.*; upon trust to assign to *Horne* and *Deschamps*, junior, for the purpose of carrying on the partnership; and *Mellish* assigned to them accordingly.

In *January*, 1796, *Horne* and *Deschamps*, junior, borrowed from *Deschamps*, senior, 800*l.* upon mortgage of the whole of the premises. In *November*, 1797, *Horne* and *Deschamps*, junior, dissolved their partnership, and assign-

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ed all their stock in trade, debts, &c. for the benefit of their creditors; and by an agreement, dated the 21st of *November*, 1797, *Deschamps*, senior and junior, agreed, that upon payment by *Horne*, his executors, &c. to *Deschamps*, senior, his executors, &c. of 2,000*l.*, in part satisfaction of the sum of 2,230*l.*, by equal instalments, at 2, 4, and 6 years, with interest payable half-yearly, *Deschamps*, senior and junior, would, after the expiration of the six years, and after full payment and satisfaction of the said sum of 2,000*l.*, and interest as aforesaid, assign all their respective interests in the premises, fixtures, utensils, &c. to *Horne*.

*Horne* was upon the execution of the agreement put in
* 226 possession, and carried on the business on his own *account until his bankruptcy; which took place upon the 19th of *April*, 1800. The only payment he made to *Deschamps*, senior, was 100*l.* The premises were purchased by the directors of the *London* Dock Company, under the act of parliament,(a) for the sum of 3,500*l.*; and the different parties claiming having executed the conveyance without prejudice, the bill was filed in *July*, 1802, by the assignees under the commission of bankruptcy against *Horne*; praying that the plaintiffs may be declared to have been entitled to a specific performance of the agreement of *November*, 1797; and therefore to be entitled to the residue of the money, paid by the *London* Dock Company, or to a moiety thereof.

(a) Stat. 40 Geo. III.

The defendants, *Deschamps*, senior and junior, by their answer stated, that, *Horne* becoming soon after the agreement very much embarrassed, and wholly unable to comply with the terms, it was considered as relinquished; and was in fact made void by his non-compliance; but he was suffered to continue in possession as lessee of *Deschamps*, senior, at the rent of 100*l.* a year; and as such lessee, about two years after the agreement, *Horne* paid to *Deschamps*, senior, 100*l.* being one year's rent; which was the only payment he ever made as lessee, or otherwise.

Mr. *Fonblanque* and Mr. *Cullen*, for the plaintiffs, contended upon the evidence, that the inference was acquiescence rather than abandonment; and though time is not to be considered immaterial, it is not to be strictly regarded. 1806. Alley v Deschamps.

*The *Solicitor-General*, and Mr. *Bell*, for the defendant. * 227

In the case of *Guest* v. *Homfray*(*a*) all the authorities are collected, in which the Court, proceeding upon the particular circumstances of each case, has held an agreement abandoned by a party, who had not taken any step for a considerable period. Ever since the case of *Lloyd* v. *Collet*,(*b*) the notion, that a specific performance might be compelled at any distance of time, that the time upon such a subject was immaterial, has been corrected. A plaintiff, coming for a specific performance after a great lapse of time, must satisfy the Court, that he has not abandoned his right; that he has not lain by, with a view to take advantage of fortuitous circumstances, if the event should be favourable to him; that during the whole period he had in contemplation to perform the contract; and the other party expected to be called upon. None of these parties thought of performing this contract until a considerable time after the bankruptcy, when the value was greatly increased by the purchase for the use of the *London* Docks. The bankruptcy considerably strengthens the defendant's case. In *Brooke* v. *Hewitt*,(*c*) the question, whether bankruptcy had not the effect of putting an end to the agreement, was much discussed; and the Lord Chancellor thought it a very material ingredient for that purpose.

(*a*) *Ante*, vol. 5. p. 818.

(*b*) 4 *Bro. C. C* p 469 *ante*, vol 4 p. 689, 690. Note.

(*c*) *Ante*, vol. 3 p 253 See vol. 12 p. 513.

The Lord CHANCELLOR.

I have upon another occasion(*d*) stated my opinion upon the doctrine of specific performance. This *Court assumed the jurisdiction upon this simple principle; that the * 228

(*d*) See *Halsey* v *Grant*, *ante*, 73.

1806. Alley v. Deschamps

Origin of the jurisdiction to grant the specific performance of an agreement. The doctrine of compensation has been carried too far. It is not to prevail, unless the party will substantially have that, for which he contracted.

(a) See *Drewe* v. *Hanson* ante vol. 6 p. 675

party had a legal right to the performance of the contract; to which right the Courts of Law, whose jurisdiction did not extend beyond damages, had not the means of giving effect. Even that was considered by the Courts of Common Law to be a great usurpation. Afterwards, however, the Court went much farther; and the doctrine of compensation has been carried to an extent, not justified by the antient course, and which I never will follow; as upon the contract for the house and the wharf, and the other cases, that have been noticed with disapprobation by Lord *Eldon*.(a) This Court ought not to interfere, unless it is clear that the party will substantially have that for which he contracted. With regard to this particular case, it would be very dangerous to permit parties to lie by, with a view to see, whether the contract will prove a gaining or losing bargain, and, according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance, which is always the subject of discretion.

*December* 18. The Lord CHANCELLOR.

Time, with reference to the performance of a contract, not immaterial. Origin of the jurisdiction to grant a specific performance.

* 229

(a) *Ante*, p. 76 *Halsey* v. *Grant*.

Under the circumstances of this case there is not a colour for decreeing a specific performance of this agreement. Lord *Hardwicke* could not have stated what is supposed to have been laid down in the case of *Gibson* v. *Patterson*,(b) that, as a general proposition, time is in equity perfectly immaterial, a proposition, very extraordinary, when the origin of this jurisdiction to grant a specific performance is considered. This *relief, I have formerly observed,(a) was first given upon a legal right, instead of damages; which was followed by another class of cases equally clear, that where a party was not able to perform his engagement, according to the strict letter, if the failure

(b) 1 *Atk.* 12.

1806.

Alley v. Deschamps.

was not substantial, the other should not be permitted to take advantage of the strict form. But the relief was never given in the extravagant manner, which the circumstances of this case would require; that a man, having done nothing, having broken his contract, may at any distance of time claim all the advantage, as if he had fulfilled it.

In the case of *Harrington* v. *Wheeler*,(*b*) which is not unlike this case, particularly in the circumstance that money was paid, Lord *Roslyn* dismissed the bill with costs; the plaintiff not having done any act. The same principle is laid down in *Lloud* v. *Collet*,(*c*) and the report of *Gibson* v. *Patterson*,(*d*) in which the lapse of time appears to have been considered as perfectly immaterial, is in those cases corrected. This is a most extravagant case.

(*b*) *Ante*, vol. 4. p 686.

(*c*) 4 *Bro. C. C* p. 469. *ante*, vol. 4. p. 689 p 690. Note (*b*).

(*d*) 1 *Atk.* 12.

I take it upon the evidence, that possession was given upon the faith of the agreement; and that the sum of 100*l.* was paid, not, as it has been strongly contended, as rent, but in part satisfaction of the contract. I will also take it, that the agreement was not abandoned; that the bankrupt did not by his own act consent to rescind it; though there is evidence for that. But my judgment proceeds upon a plain principle, that a bill for specific performance of an agreement will not be endured under such circumstances: *nothing farther having been done towards performance when the purchaser became bankrupt nor afterwards, until these premises by a subsequent event proved to be much more valuable, than they were at the time the contract took place. Where then, as Lord *Roslyn* says, is the equity, placing him in the same situation, as if he had in due time availed himself of the contract? * 230

The bill, as far as it prayed a specific performance of the agreement, was dismissed with costs.

1806.

December 19.

To a plea in bar of a fine, a direct positive averment of seisin is necessary.

A plea, therefore, alleging seisin only by way of argument, viz that the party, being in possession and receipt of the rents, and being thereby seised, &c. was overruled; with liberty to amend

## DOBSON *against* LEADBEATER.

THE bill, filed on the 21st of *December*, 1805, stated, that *Osborne Oakley* was at the time of making his will and at his death, seised or well entitled to him and his heirs in possession, reversion, or remainder, of or to a considerable real estate, and particularly one-third or some part or share of and in certain premises at *Higher Kinnerton*, in the County of *Flint*, and *Lower Kinnerton*, in the County of *Chester*. The bill then set forth the will of *Osborne Oakley*, dated the 31st of *October*, 1777, giving to the plaintiff one-third part of his estates in those counties by the description of *Higher* and *Lower Kinnerton*, with all his real and personal estates, that he might be possessed of at the time of his decease.

The bill farther stated, that the testator died, leaving the plaintiff an infant, and the defendant, claiming some title to the real estate under some former will

* 231 *in his favour, procured some conveyance in trust for him and his heirs from the sister and heiress at law, and upon her death in 1789, the plaintiff being still an infant, the defendant entered into possession of all the real estates of the testator, including those at *Kinnerton*; and possessed himself of the deeds. The plaintiff attained the age of 21 in 1797, and is in very indigent circumstances, and has therefore been unable to take any steps to recover the premises. The bill then suggesting, that there are terms outstanding, which the defendant threatens to set up against any ejectment, prayed an account of the rents and profits, and delivery of possession, and of the title deeds; that the plaintiff may be at liberty to bring an ejectment; and that the defendant may be restrained from setting up any outstanding term, &c.

The defendant to so much of the bill as seeks an account of the rents and profits, of the premises at *Lower*

1806.

Dobson v. Leadbeater.

*Kinnerton*, and possession of one-third of the premises, and delivery of the title deeds, &c. and a discovery of the defendant's right to hold the said one-third, &c. pleaded in bar, that after the death of *Osborne Oakley*, which happened in or about the year 1777, defendant entered into possession of the one-third part or share of the said messuages, farms, lands, and hereditaments; claiming to be seised in fee thereof under the will of the said *Osborne Oakley*, and was in the actual possession thereof, and in the receipt of the rents and profits thereof; and that being thereby seised, and in the actual possession of such one-third part or share of and in all and singular the messuages, farms, lands, tenements, and hereditaments, aforesaid, at the Court of session in the County of *Chester*, on the 8th of *April*, in the 30th year of his present majesty, a fine sur conuzance, &c. was levied of the *said messuages, * 232 &c. by the description of one undivided third part, &c. with proclamations, that the estates, of which such fine was levied, are all the messuages, &c. of which *Osborne Oakley* died seised of any estate of inheritance, in the county of *Chester*, that after the levying such fine, this defendant was, and now is in the peaceable possession of the said messuages and premises, and every part thereof, without any lawful entry thereon, or on any part thereof, by the complainant or any person whomsoever, within five years after the proclamations and since, and without any suit prosecuted by the complainant within five years after his age of 21, until the bill filed, with an averment, that the complainant hath not since *October*, 1797, when he attained the age of 21, been under any legal disability; and that the right of the complainant, if any he ever had, accrued before the levying such fine, and five years and upwards before the filing of the bill.

*The Solicitor General*, and Mr. *Martin*, in support of the plea, said, it was exactly copied from the plea in *Butler* v. *Every*,(a) and that, if the charge of terms outstanding had not been thrown in, this would be a mere ejectment bill.

(a) 3 *Bro. C. C.* 80. *ante*, vol. 1. p. 136.

1806

Dobson v. Leadbeater

*The Attorney General* and Mr. *Bell*, for the plaintiff.

This plea has not any averment, that the defendant was seised: an essential averment; which is not supplied by the assertion, that he claimed to be seised, or, that, being seised, he levied a fine. A direct, substantive averment, that the fine was levied by a person seised, cannot be dispensed with at law, and is as necessary to such a plea in
* 233 this Court. The precise question *was decided in *Story* v.
(a) 2 Atk 630. Lord *Windsor*, (a) and that decision is adopted by Lord
(b) Mit 203. *Redesdale*; (b) and upon the same rule the plea in *Page* v.
(c) Ante, vol 2 p. 450. *Lever* (c) was overruled, though the opinion of the Court was strong against the bill. This averment in substance amounts to no more than that the defendant obtained possession, pretending to be seised; and being thereby in possession levied the fine. This plea is also open to objection, as being argumentative; stating, that the defendant was in possession and receipt of the rents; and that, being thereby seised, &c.

The *Solicitor-General*, in reply.

The strictness, required in pleading a fine at law, is not necessary here. The averment of seisin is by the effect of the subsequent words sufficient. In *Page* v. *Lever* the averment was merely of possession: yet the defendant was permitted to amend. In *Butler* v. *Lvery*, Lord *Redesdale*, who was the plaintiff's counsel, did not take this objection.

The Lord CHANCELLOR.

A legal bar to be strictly pleaded.

Where a plea of a strictly legal bar is introduced in equity, I shall expect equal strictness, as at law: but Courts both of law and equity look with indulgence upon a slip merely in form. In pleading a fine it is absolutely necessary, that it should appear upon the face of the plea to be a good fine; and for that, an averment of seisin is necessary, which admits a traverse. This plea appears to me to

—be argumentative; alleging that after the death of *Oakley* the defendant entered into possession, claiming to be seised in fee under his will; and was in the actual possession, and *in the receipt of the rents and profits; and that, being thereby seised, the fine was levied. The effect of this is only an averment of possession; and that his seisin grew out of his possession. As the averment of possession would not do, neither will an averment of seisin, standing upon that possession alone. * 234

This plea therefore is bad. But, as this is a mere slip in form, and has a strong apology, the very same plea having prevailed in the case before Lord *Thurlow*,(a) this objection not being taken by Lord *Redesdale*, who was counsel in support of the bill, it would be very harsh to refuse liberty to amend; the course that was taken in *Page* v. *Lever*.(b) This plea must therefore be overruled, with liberty to amend.

(b) *Ante*, vol. 2. p. 450.

(a) Though it appears, that there was no direct, positive, averment of seisin in *Butler* v *Every*, both Lord *Thurlow* and the counsel seem, according to the report, *ante*, vol 1 p. 136. to have conceived that the plea did contain a sufficient general averment of seisin. The objection was distinctly taken at the bar, as to the advowsons; that as to them, seisin by presentation, not being alleged, the fine could not operate as a bar; and the plea, being entire, must be overruled. The answer of Lord *Thurlow*, overruling the objection, is the general averment of seisin.

## BRADSHAW *against* OUTRAM.

ROLLS.
*December* 17. 19.

Mortgage by tenant in fee by creating a term. The personal representative ought not to be a party to a bill of foreclosure.

TENANT in fee-simple made a mortgage by creating a term of 1,000 years, with a proviso, in the usual manner to be void upon payment by the heirs, executors or administrators. A bill of foreclosure was filed against the infant heir at law, and also against the executrix, his mother.

1806.

Bradshaw v. Outram

*Mr. *Leach*, for the defendant, the executrix, insisted that, as no decree could be had against her she ought not to have been made a party, and the bill as against her must be dismissed with costs.

Mr. *Hart* and Mr. *Spranger*, for the plaintiff.

This is a mortgage for a term of years. A mortgagee of the inheritance is not bound to make the executor of the mortgagor a party; but may confine himself to the relief against the heir; who alone is entitled to redemption; and who is to bring forward the executor, to exonerate the estate. But the mortgagee has, if he chooses, a right to bring the executor before the Court; as he is entitled, if he chooses, to have his money, instead of a foreclosure. But, where the mortgage is of a term of years, the mortgagee cannot have a foreclosure, unless in the first instance he brings forward the personal representative, who must redeem, and who, if not made a party, might after the foreclosure tender the money. The personal representative is expressly mentioned in the proviso, to be void, if either the heir, executor, or administrator, shall pay the money. As the personal representative is bound to pay the mortgage, if she has assets, this is the proper time to call upon her.

Mr. *Richards* (being applied to by the Master of the Rolls) said, he conceived, that the personal representative had nothing to do with it. It was, however, said at the bar, that the practice of the late Mr. *Lloyd* was to make the personal representative a party.

The Master of the Rolls.

With the species of term the personal representative
*236 has nothing to do. It is created only by being *mortgaged. The executor is named in every mortgage-deed,

and in every case the personal representative is to pay, if there are assets; though the heir is to have the benefit. But, as this is a mere matter of practice, farther inquiry should be made upon it.

1806. Bradshaw v. Outram.

The bill was dismissed against the executrix and by consent, without costs.

December 19.



## GREY *against* The Duke of NORTHUMBERLAND.

December 23.

Injunction by a copyholder; restraining the Lord preparing to to open a mine. Distinction, as to a mine opened, and working.

UPON certificate of the bill filed and affidavit, a motion was made for an injunction to restrain the defendant from opening a mine upon the plaintiff's copyhold land, the defendant being Lord of the Manor.

The *Solicitor-General*, in support of the motion, admitting, that the Court would be very unwilling to interpose, where a mine has been opened, and was actually in a working state, the consequence of which might be irreparable mischief, insisted, that under the circumstances appearing by the affidavits, only preparations made to open a mine, by erecting sheds, &c. the Court would, upon the same principle, to prevent irreparable mischief, interpose, as the question, whether the Lord can without a special custom open a mine, ought to be tried at law, and the Assises for the County of *Northumberland* being held only once a year, the trial cannot take place before *July*.

*The Lord CHANCELLOR. * 237

Is there any case upon the point, whether the Lord can without a special custom open a mine? The effect might be a disherison of the whole estate of the copyholder. Even without an authority, I conceive the distinction between stopping the working of a mine already opened, and opening, to be as it has been stated.

1806.



Grey v. Duke of Northumberland.

The *Solicitor-General* mentioned the case of *Player* v. *Roberts*,(a) as an express decision upon the point.

The injunction was granted.

(a) Sir *W. Jones*, 243.



*December* 20. 23.

## EX PARTE JONES.

Commitment in the jurisdiction of lunacy for a contempt, by the publication of a pamphlet Ignorance of the contents will not excuse the printer.

THE object of this petition was to remove the committee of a lunatic, and to bring before the Lord Chancellor an alleged contempt by the committee and his wife, and other persons, as the authors, printers and publishers, of a pamphlet, with an address to the Lord Chancellor by way of dedication, reflecting upon the conduct of the petitioner and others, acting in the management of the affairs of the lunatic under orders, made in pursuance of the trusts of a will: the affidavits representing the conduct of the committee and his wife, intruding into the Master's office, and interrupting, not only the business in this particular lunacy, but all other business. The wife of the committee
* 238 avowed *herself to be the author of the pamphlet; alleging the innocence of her husband.

The *Solicitor-General* and Mr. *Hart*, in support of the petition, were stopped by the Lord Chancellor, who called on the counsel against it.

Mr. *Plowden* resisted the petition; contending, that the petitioners had a remedy at law.

The Lord CHANCELLOR.

As to a remedy at law, the subject of this application is not the libel against the petitioner. The case of *Roach* v. *Garvan*,(a) and another, there mentioned, were cases of constructive contempt, depending upon the inference of an intention to obstruct the course of justice. In this in-

(a) 2 *Atk*. 469.

stance that is not left to conjecture; and, whatever may be said as to a constructive contempt, through the medium of a libel against persons engaged in controversy in the Court, it never has been, or can be denied, that a publication not only with an obvious tendency, but with the design, to obstruct the ordinary course of justice, is a very high contempt. Lord *Hardwicke* considered persons concerned in the business of the Court as being under the protection of the court, and not to be driven to other remedies against libels upon them in that respect. But without considering whether this is or is not a libel upon the petitioner, what excuse can be alleged for the whole tenor of this book; and introduced by this declaration of the purpose, which the author intended it to answer? It might be sufficient to say of *the book itself, stripped of the dedication, that * 239 it could be published with no other intention than to obstruct the duties cast upon the petitioner, and to bring into contempt the orders that had been made. But, upon the dedication, this is not a constructive contempt. It is not left to inference. In this dedication the object is avowed: by defaming the proceedings of the Court, standing upon its rules and orders, and interesting the public, prejudiced in favour of the author by her own partial representation, to procure a different species of judgment from that which would be administered in the ordinary course, and by flattering the judge to taint the source of justice. This pamphlet has been sent to me.

As to the printers, as Lord *Hardwicke* observes, it is no excuse that the printer was ignorant of the contents. Their intention may have been innocent: but as Lord *Mansfield* has said, the fact, whence the illegal motive is inferred must be traversed; and the party admitting the act cannot deny the motive. The maxim "*Actus non facit reum, nisi mens sit rea,*" cannot be made applicable to this subject in the ordinary administration of justice; as the effect would be, that the ends of justice would be defeated by contrivance. But upon the satisfactory account given by three of these printers, though undoubtedly un-

1806. Ex parte Jones.

der a criminal proceeding they would be in mercy in a case of contempt, though I have the jurisdiction, I shall not exercise it. The other printer appears upon the affidavits under different circumstances. Having made the observation, that this pamphlet ought not to be printed, being totally uninteresting to the public, yet he does print it; and, though the *locus penitentiæ* was afforded to him, and he was called upon not to print any more, he proceeded, until he had notice of this petition.

* 240 *Let the committee and his wife, and the printer, to whom I have last alluded, be committed to the Fleet Prison. Dismiss the committee from that office, and direct a reference to the Master as to the appointment of another committee.



1805. *December* 20. 23. Before Lord *Eldon*.

1806. *December* 19, 20 Before Lord *Erskine*.

## LORD KENSINGTON *against* MANSELL.

The statute 9 *Geo*. I. c. 29. providing for the admission of copyholders, infants, or *femes coverts*, is confined to the cases expressed; viz. title by descent or surrender to the use of a will; and does not apply to a title under a deed.

Therefore, to a bill by the Lord, stating a title in remainder by deed of appointment under a settlement, and an admission by the tenant for life, without fine, having paid a fine upon a former admission under his original title, and upon his death, praying a discovery and production of the deed, in aid of an action under the statute, a demurrer was allowed.

THE bill stated, that the plaintiff is seised of the Manor of *Earl's Court, Kensington;* and that by the custom of the Manor, all persons claiming a right to tenements, holden of the Lord by copy of Court Roll, ought to be admitted, and to pay a fine upon such admission, at the will of the Lord; and that a certain parcel of land, now built upon, and called *Gloucester Row*, is situated within, and holden by copy of Court Roll of the Lord of the said Manor; and the Lord is entitled to a fine upon the admission of all tenants to the said copyhold land, or any parcel thereof.

The bill then stated, that on the 3d of *June*, 1766, *William Brown* was admitted as tenant of the said parcel

of land, to hold to him and his heirs, by copy of Court Roll, at the will of the Lord, according to the custom; and on his admission paid a fine at the will of the Lord; which was assessed at two years' value *of the premises. Upon the marriage of *Brown*, in 1768, some deed or deeds, or writings, were executed by him, whereby he covenanted to surrender the said copyhold estate to the use of himself for life, with remainder to trustees to preserve contingent remainders, remainder to his intended wife for life, remainder to trustees to preserve contingent remainders; remainder to the use of any one, two, or more, child or children of the marriage, in such shares, and for such estates, and with such limitations and provisions, as *Brown* should by deed or will appoint; and, in default of such appointment, to the use of all and every the child and children in tail general; and, in default of issue of the marriage, to *Brown* and his heirs. Upon the 11th of *April*, 1768, *Brown* made a surrender of the copyhold premises, and was again admitted to the uses of the settlement, and he did not on such readmission pay any fine, as he had paid his fine on his former admission. * 241

The bill farther stated, that in 1799, *Brown*, in pursuance of the power of appointment vested in him by the settlement, and in contemplation of a marriage between *Elizabeth*, his only daughter and presumptive heir, and *Mansell Dankin Mansell*, did execute some deed or deeds, &c. bearing date on some day or days in 1799, appointing all the copyhold premises to or for the benefit of his daughter, or her intended husband, and her issue; so that she became entitled to an estate for life, or some larger estate, expectant on the determination of the estate for life of *William Brown*; and the defendants *Praed* and *Alexander* were named as trustees in the said settlement.

The bill then stated, that the marriage took place, and *William Brown* died in 1803; and thereupon *Elizabeth*

1806 Lord Kensington v. Mansell

*Mansell under the settlement and deed of appointment, became entitled to the copyhold premises for her life, or some large estate, according to the custom; and upon the death of *Brown Mansell*, and his wife, or he in her right, entered, and thereupon *Elizabeth Mansell* ought to have been admitted tenant to the said copyhold estate, and to have paid to the plaintiff, as Lord, a fine according to the custom of the Manor, but *Mansell* and his wife, being advised, that under the act of Parliament, 9 *Geo.* I. the rights of *Elizabeth Mansell* to the said estate as a feme covert are protected from forfeiture for want of a tenant, they and their trustees determined, that she should not appear, to procure herself to be admitted; and they did so, in order to defeat and delay the plaintiff in the recovery of his fine; and upon a Court Baron upon the 20th of *July*, 1803, the homage presented, that *Brown* died seised since the last Court; and *Mansell* and his wife had notice of such presentment, and were required to appear to be admitted; but they wilfully omitted to appear, and thereupon in pursuance of the act,(*a*) upon the 21st of *October*, 1803, she was admitted by attorney. The plaintiff assessed the fine at the sum of 12,000*l.* not exceeding two years improved value; but, *Mansell* and his wife having refused or neglected to pay any fine, the plaintiff in *Hilary* Term, 1804, brought an ejectment. on the trial of which ejectment on the 29th of *June*, 1804, Lord *Ellenborough* ruled, that it was necessary for the plaintiff to produce in evidence the deed of appointment, under which *Elizabeth Mansell* became entitled to be tenant; and, such deed being in the hands of the attorney of the defendants, *Mansell* and his wife, and the trustees, or some of them, who refused to produce it, the plaintiff was unable *to make out his case, that *Elizabeth Mansell* was entitled to the said estate according to the terms of the said admission; and, therefore, the plaintiff was nonsuited for want of the production of such evidence.

* 243

(*a*) Stat 9 *Geo* I. c. 29.

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The bill prayed a discovery, and that the defendants may be decreed to produce the said deed or deeds, or other instrument of appointment, under which *Elizabeth Mansell* became and is entitled to the said copyhold estate; and that the plaintiff may have the benefit of a production thereof at the trial of any action of ejectment, to be commenced by him, according to the act of Parliament,(*a*) in order to satisfy himself his fine.

(*a*) Stat 9. *Geo.* I. c. 29.

To this bill all the defendants, *Mansell* and his wife, and the trustees, put in a general demurrer.

The Lord CHANCELLOR.

This act of Parliament(*b*) seems only to go to the case where the wife comes in by descent or surrender to the use of the will. I should have thought, under this act it was better not to produce this deed. The opinion of the Court might have been taken, upon what appeared, whether Mrs. *Mansell* was such a *feme covert* as took under the scope of this act: 2dly. Whether the Lord having admitted her, the fine which should have been paid by the tenant for life, became payable by those in remainder. Another circumstance is, that the Lord admitting has a right previously to call upon the person claiming to be admitted, to state the uses of the settlement, and then has no occasion to look at this deed. Even an appointee *would be nothing more than a person in remainder under that settlement. * 244

(*b*) *Ibid.*

If it appears upon the Court-Roll, that *Brown* was admitted under this settlement, I cannot imagine, how this instrument at *Nisi Prius* was not evidence for the defendant, instead of for the plaintiff. I should have held that there was not an appointment, until an appointment was

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proved: and that it was upon those who were to disappoint the Lord of his fine, to produce that settlement; not upon the plaintiff. The fact of such a settlement, as in the bill stated, and an admission to the uses of that settlement, is admitted.

The argument is, 1st. That there is no want of this production: 2dly. That if there is, it is entirely the Lord's fault. If the entry upon the Rolls be simply "to the uses "of such a settlement," it was the fault of the steward to receive it; and he had a distinct right to call for a specification of those uses; and then the question is, whether the steward's negligence is a ground to come here.

Mr. *Richards* and Mr. *Kenrick*, in support of the demurrer.

The want of this deed of appointment could not, as the bill represents, be the cause of the nonsuit. The defendant claims merely as tenant in tail under the settlement. A deed, executed among these parties, is nothing to the plaintiff, who, as your Lordship observes, had a clear course without the deed; the production of which would be nugatory at least.

Mr. *Romilly* and Mr. *Hart*, for the plaintiff.

The question is, whether it is so clear, that the plaintiff is not entitled to a discovery of this deed, that *the suit shall proceed no farther. The demurrer is not upon the ground of any forfeiture or other injury to the defendant from the discovery. The only ground is that the plaintiff asks that which is unnecessary.

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The bill does not shew, whether all the uses of the deed are stated upon the records of the Manor, or not. Suppose the surrender to contain the uses of the deed; it is essential for any person, claiming under this deed, to shew

that appointment has been made. It is not sufficient to claim either under an appointment, or in default of appointment; and, to ascertain that fact, the bill was filed. The Lord, bringing the ejectment, should shew his title; and that he had a right to admit the *feme covert* by attorney. He must shew all the requisites under the act.(a) If all these things are necessary to make out the title, the plaintiff calls for discovery of a deed, making part of his title.

(a) Stat. 9 Geo. I. c. 29.

It would be strong upon demurrer to hold, that this decision at law was so clearly wrong, that the suit ought not to proceed. For that the mistake ought to be very clear. The only ground upon the record is, that this is not necessary to make out the title at law. At least the plaintiff is entitled to the assistance of the Court to ascertain, whether he can recover the fine. That is a question at law; for the decision of which the production of this deed is necessary. The limitations of the settlement connect it with the appointment. Upon the whole context the act(b) must be considered to mean the titles, generally that devolve upon *femes covert*. Notwithstanding the limited *terms in which it is expressed, this case is within the intent. * 246

(b) Stat. 9 Geo. I. c. 29.

The Lord CHANCELLOR.

Must it not go upon this, that the party taking under the deed, if there is an admission of the tenant for life, there is no occasion for a farther admission? may it not therefore be studiously omitted?

Estate in default of appointment vested until appointment.

My difficulty is, that the estate of the *feme covert* ought to have been taken by the Court upon the ejectment to be an estate vested in default of appointment; until it was shewn, that there was an appointment.(a) I am much struck with this difficulty, taking it for the present to be

(a) *Smith* v. *Lord Camelford*, ante, vol. 2. p 698.

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the case of a *feme covert* within the act of Parliament,(*b*) and that the appointment would take her case out of the act. If the Lord had admitted her either as heir general or according to any other estate, capable of being defeated only by an appointment made, the plaintiff should have recovered in the ejectment, unless an appointment was shewn; for it cannot be said to exist, until its existence is proved; and it is for the defendant to prove it. If it was shewn, that she was not admitted according to the act, then the nonsuit was right. But how was it incumbent upon the plaintiff to prove that appointment?

(*b*) Stat 9 Geo. I c 29.

The lord, admitting a tenant for life, may apportion the fine, but cannot remit it to the tenant for life, and charge the whole upon the remainders

When the tenant for life comes on behalf of himself, and all in remainder and reversion, if the Lord does not take the fine, he cannot afterwards insist upon the fine from those in remainder. The Lord may apportion the fine among the different parcels of the inheritance: but it is not possible to say, the tenant for life shall pay nothing, and those in remainder *shall pay the whole. The appointee, when once become such, is the same as if originally named in the first instrument, the appointment being only an instrument enabling him to succeed under the first instrument.

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The Lord CHANCELLOR.

1805 December 23.

I have read the bill and demurrer; but have not been able to get information from the quarter I expected as to what passed at the trial. I have, however, received information sufficient to ascertain that the bill does not accurately state the transactions in the case. I rather think, upon the whole, what ought to be done is to amend the bill, paying the costs of the delay: but my opinion is, that as it stands at present upon the bill, it will not do. There are many very material points in the case.

The order was, that the demurrer should be allowed; the plaintiff to be at liberty to amend the bill.

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The bill was amended by introducing at length the surrender of the 11th of *April*, 1768, stating specifically the uses of the settlement; that *Brown* was admitted accordingly, to hold for his life, and after his decease, to the several other uses in the surrender declared; that he paid no fine, because he had before been admitted tenant, and had then paid a fine, and that at the same Court he surrendered the reversion in fee-simple expectant on the precedent estate for life and in tail, before mentioned, to such uses as he should by deed or will appoint. The amended bill also set forth a subsequent presentment, stating the deed, dated *the 29th of *June*, 1799, by which *Brown* appointed the premises to Mrs. *Mansell*, his daughter and only surviving child, her heirs and assigns forever, subject to his estate for life; and stated her admission accordingly by attorney, nominated by the Lord under the act of Parliament. * 248

To the amended bill also a general demurrer was put in.

Mr. *Richards* and Mr. *Kenrick*, in support of the demurrer. 1806. *December* 19.

The plaintiff has no right either to discovery or relief. The bill is filed in aid of an action under the act of Parliament.(a) The answer is, that the action is such as is not given by the act; and the Court will not give discovery in aid of an action, that will not lie. The act provides for two cases only; when an infant or a *feme covert* is entitled by descent, or surrender to the use of a will, to be admitted tenant. In those two cases only the action is given, and the Lord is entitled to name an attorney for the one, or a guardian for the other. The bill does not bring the present defendant within this act; not alleging either

(a) Stat. 9 Geo. 1. c. 29.

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of the cases specified by it; but resting upon an appointment by deed, in the life of the defendant's father, having no reference to any will. How can it be said, the spirit of the act is more extensive than the words? If the act provides for two cases only, the Court must intend, that it meant what is expressed; and cannot extend it upon any principle. The act is not confined to those two cases by an involuntary omission. There was no reason, why the other case should have been provided for, and there is
* 249 good reason why it *should not. The question may be tried at law: but this Court will not give assistance to an action brought, unless satisfied that an action will lie.

Upon the second admission of *Brown* the fine was excused, the reason of omitting to take it being stated to be, that a fine had before been paid. When a party claims to be admitted to the use of himself for life, with remainders over, it is in the breast of the Lord to assess the full fine. If *Brown* had paid the full fine upon his second admission, the persons claiming under the settlement, when admitted afterwards, would not have had to pay any fine. There might be many reasons, that cannot be known, for considering the fine as taken in respect of those in remainder. There was an admission upon the Rolls, to the benefit of which they were entitled, and there was no occasion for any other admission. This point, that the admission of the tenant for life is the admission of those in remainder, and upon the change of the tenant by the death of the tenant for life, involving no change of the estate, another admission, and consequently another fine, is not required, was not determined in the last case, *Doe* on the demise of *Whitbread* v. *Jenney*,(a) but stands upon several old authorities, which were considered upon that occasion, and in *the Earl of Bath* v. *Abney*.(b)

(a) 5 East, 522.

(b) 1 *Burr.* 206. See *Auncelme* v. *Auncelme*, *Cro. Jac.* 31. *Bell* v. *Bagdan*, *Moor*, 358. *Tiping* v. *Bunney*, *Moor*, 265. *Gyppes* v. *Bunny*,

*Supposing this to be within the act of Parliament, what right has the plaintiff to call upon the defendant to produce this deed? A plaintiff has no right to call upon the defendant to produce the instruments, which he is to use in his defence. The plaintiff must shew that the particular instrument is his evidence, that he has an interest in that evidence, and that it is against conscience in the defendant to withhold that evidence, which, if produced, would shew, that the defendant has no interest. What interest has the plaintiff in the defendant's deed? Suppose, this instrument did not appear upon the Rolls of the Manor; the plaintiff could have no right to ask, what defence could be made. If this instrument did not appear upon the Rolls, *Brown* would appear to be tenant for life, with remainder, for want of appointment, to the children of the marriage. The plaintiff has only to proceed against the person, appearing to be the child of a marriage. Then consider, under what circumstances this deed of appointment came upon the Rolls; not by the act of the defendant. It appears by the bill, that the plaintiff, the Lord of the Manor himself, put this instrument upon the Rolls, viz. the person, appointed by him attorney within the act, placed it upon the Rolls; and the steward admitted it. What equity arises from that to the plaintiff? Shall the plaintiff do indirectly what he could not do directly, merely as he chooses, without the assent or knowledge of the defendants, to place that instrument upon the Rolls? It is his act, and he has no interest in the deed in any other way than by putting it upon the Rolls.

The *Solicitor-General* and Mr. *Hart*, in support of the bill.

*This is a demurrer to a bill, praying relief as well as discovery. The serious question is, whether infants or * 251

*Cro. Eliz.* 504. *Batmore* v *Graves*, 1 *Vent.* 260. *Blackbu[illegible]* v *Grav[illegible]*, 1 *Mod.* 102. 120. 3 *Keb.* 263. 329. *Barnes* v. *Corke*, 3 *Lev.* [illegible] *Brown's* case, 4 *Co.* 22. b. *Church* v *Mundy*, *ante*, vol 1? p 4 6

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*femes covert* entitled to copyhold estate, no matter by what title, are within the act or not. First, this is a remedial law, for the benefit of persons under incapacities, infants and *femes covert*. The preamble is general, as is the object of the act stated in the title. The words of the first clause, it is true, are confined to two cases. But the evil was the total loss of the estate; an evil as obvious in every other case, as in the two cases specified.

A power of appointment to uses, to be created at a future time, is within the scope of the evil against which the act was directed In substance there is no difference whether they are to be appointed by deed or will. The Court of Law did not consider it clear by any means, that this case is not within the act. It is quite sufficient, that there can be a doubt upon the question. The only way in which that can be tried, is by permitting an ejectment to be brought, and by supplying the plaintiff, Lord *Kensington*, with the evidence to support it.

It is true, a party is entitled only to a discovery of what is necessary for his own title, and not as to that of the defendant, according to Lord *Shaftsbury* v. *Arrowsmith*,(a) and many other cases. But it is clear, by the admission of the defendant by her attorney, that her title-deeds make out the title of the Lord of the Manor. The Legislature has given the Lord the title of the person he admits. He has a right to enter, but only if he shews that the party admitted is entitled to be admitted, and is the person

* 252 *from whom the fine is due. He is put in the situation of a tenant *pur auter vie*, to hold the copyhold estate during the life of the person admitted, if his fine is not paid. The plaintiff does not ask the production of a particular deed, but for deeds generally. The objection to the production of a particular deed may come properly upon exceptions to the answer, but not by demurrer.

(a) *Ante*, vol. 4. p. 66.

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If it happens, that the same deed constitutes in part the defence, in part the plaintiff's title, then there is an equity upon the subject. If the plaintiff's title can be shewn to depend upon the deed in any way, that is sufficient to give him an equity. There is this farther equity. In 1768, *Brown* was the owner of this copyhold, with the ordinary right to be admitted as next heir. There was no right in him beyond that, and whatever the jury chose to find as to the limitations of the deed, it was merely *ex gratiâ* of the Lord to permit that entry to be made. He was entitled to reject any admission upon that ground. Shall the tenant, having got those limitations entered upon the Roll, take advantage of that to withhold the deed? This is not put upon the records by the act of the Lord. The Jury find it. The Lord admits it, subject to all his legal rights.

The Lord remitting the fine upon the admission of tenant for life, does not discharge the remainders.

The Lord CHANCELLOR, during the argument intimated, that the effect of remitting the fine upon the admission of the tenant for life could not be, that the remainder-men are discharged.

*The Lord CHANCELLOR. * 253

I have looked at the note of what passed, when this was before Lord *Eldon*, and I wish to put it to you, whether it is not material to see, how the law is, for I think upon the cases which I have seen, that this act of Parliament was not drawn, as it is, by any mistake or misapprehension. The preamble is very general, and, being a remedial law, the most liberal construction must be made. The use of that act is, that where a party will not come in for admission, until which the Lord can have no remedy for the fine, neither a forfeiture shall accrue, nor shall the Lord be left without remedy. It occurs to me to consider, why,

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where a man has made an appointment to uses to himself for life, with remainders for life, and in tail, should it not equally apply to the remainder-men? The reason appears to me to be this, that whenever there is a surrender, not to the use of the will, but the person comes in, as *Brown* did in the first instance, and afterwards makes a settlement, and desires to be admitted upon the footing of that settlement, the effect is, that the Lord would have been entitled to assess, not only the fine upon his tenancy for life, but also the fines upon all the remainders, upon this principle, that by the custom of all Manors, there can be no fine but upon the change of the tenant, by alienation or death, but where the party makes such a deed, the admission of the tenant for life is the admission of all the remainder-men. If, however, a special custom gives the fine against the remainder-man, the Lord may have an action for that, and there has been a difference of opinion among the judges, not upon the point that *the admission of the tenant for life is the admission of those in remainder, but upon this, whether the Lord may not make separate assessments. He may assess the tenant for life for the whole, refusing to admit, unless he pays all the fines, not only upon the limitation to himself for life, but also for all those in remainder. The next point is, when the fine becomes due. Some of the Judges say, not until the remainder attaches. In one case, *Barnes* v. *Corke*,(a) they agreed, that the admission of the tenant for life was the admission of all in remainder. The only thing, upon which they differed, was, whether the tenant, having taken the admission, which was not necessary, was not precluded from objecting to pay the fine. There is another case in *Ventris*(b) upon the same subject; another in *Cro. Eliz.*(c) and many more.

Admission of tenant for life to a copyhold is the admission of all in remainder, and the Lord may assess the whole fine

In case of separate assessments, as to the fine when the fine is due in respect of the remainder *Quære*

* 254

(a) 3 Lev 308.

(b) *Barnard* v *Graves*, 1 *Vent* 260 *Blackburn* v *Graves*, 1 *Mod* 102 120 3 *Keb.* 263 329.

The difficulty I feel is, whether this can be considered a case within the act. I think it is not within the act. In

(c) *Gyffyn* v. *Bunney*, *Cro Eliz.* 504. *Tiping* v. *Bunning*, *Moor*, 16.

the construction of the act, I shall abide by the words, and not speculate upon what the Legislature might mean, which is not expressed. I think the Lord would have a right to expunge this admission altogether. Suppose, the Lord expunged this admission, as he had a right to do, he could not bring an action for his fine until admission. If the admission of the tenant for life, was an admission of all in remainder, the Lord would have a right to it without coming to the Court. It is contended by Mrs. *Mansell*, that she was admitted by virtue of the admission of *Brown*. If so, the plaintiff may bring his action. If *she denies the admission, then he may bring an ejectment for the forfeiture. * 255

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Allow the demurrer.

## COLLETT *against* HOOPER.

Rolls. *December* 23.

Power under an act of parliament to leesee, his executors, administrators and assigns, to grant building leases, does not extend to the tenant in a renewed lease according to the usual course of church leases

(a) Stat. 17 Geo. III.

THE bill prayed the specific performance of an agreement, dated the 16th *November*, 1805, for a lease, to be granted by the plaintiff to the defendant, of premises in *St. George's Fields*, to hold for the term of 75 years from the 25th of *December* ensuing. An objection to the title was taken under the following circumstances.

By indenture, dated the 29th of *September*, 1770, the premises in question were demised by the archbishop of *Canterbury* to *Daniel Ponton*, his executors, administrators, and assigns, for the term of 21 years.

By an act of Parliament,(a) to enable the archbishop of *Canterbury* and *Daniel Ponton*, to grant building leases, pursuant to an agreement, reciting the lease to *Ponton*, and that it was agreed, that it should be lawful for *Ponton*, his executors, administrators, and assigns, to apply for and obtain an act of parliament to empower the archbishop

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and his successors, and *Ponton*, his executors, administrators, and assigns, jointly to demise or lease all or any part of the said demised premises to any person or persons for any term or number of years, not exceeding the term of 99 years, in possession, and not in reversion, for the purpose
*256 of building upon *the usual terms of building leases: viz. no fine; the best improved rent, &c. one moiety of the rent payable to the archbishop and his successor, the other to *Daniel Ponton*, his executors, administrators, and assigns; and that in case *Daniel Ponton* shall apply to parliament for powers to enable the archbishop and his successors, and *Ponton*, his executors, administrators, and assigns, to carry the said agreement into execution, the archbishop, &c. will consent to such act of Parliament, &c. and that the archbishop and his successors shall and will on all and every future renewal or renewals of any lease or leases granted, or to be hereafter granted, of the said *Daniel Ponton*, his executors, administrators, and assigns, set their fine, and reserve the same rent, as though the said agreement had not been made, and farther reciting, that it was agreed, that, if any improvement of any part of the premises, which shall be so demised, as aforesaid, shall at any time or times hereafter be made, the archbishop and his successors shall not at time or times hereafter be barred from setting, &c. upon any future renewal or renewals of any lease or leases, which hath or have been, or at any time or times hereafter shall or may be granted of the said premises, a greater fine or greater fines, than have been heretofore set in respect of such improvement, whether it shall arise on account of any lease or leases, which shall or may hereafter be made of any part of the premises, not demised in pursuance of the agreement, or through the act of *Daniel Ponton*, his executors, administrators, or assigns, or otherwise; and that *Ponton* agreed to procure persons to enter into agreements for taking the premises upon building leases, &c. it was enacted, that from and after the 1st of *May*, 1777, the said

agreement should be confirmed; and that it should be lawful for the archbishop and his successors, and *Daniel* ***Ponton*, his executors, administrators, and assigns, jointly from time to time by indentures, duly executed under the hand and seal, or hands and seals, of the archbishop and his successors, and also under the hand and seal, or hands and seals, of *Daniel Ponton*, his executors, administrators, and assigns, to make any demise or lease, demises or leases, of all or any part or parts of the said several lands and premises, in the said hereinbefore recited indentures of lease, particularly mentioned and described, and thereby demised to *Daniel Ponton*, to any person or persons for any term or number of years, not exceeding 99 years, &c. * 257

*Daniel Ponton* died intestate, before any lease was granted according to the power in the act.

By articles of agreement, dated the 7th of *September*, 1784, the archbishop of *Canterbury*, and *Thomas Ponton*, as administrator of *Daniel Ponton*, agreed to grant a building lease to *Crispus Claggett* for 98 years, according to the terms provided by the act of Parliament.

By indentures, dated the 29th of *September*, 1784, the archbishop of *Canterbury* demised the premises to *Thomas Ponton*, his executors, administrators, and assigns, for 21 years. In 1785, the premises were assigned to *William Adams*, who, by indentures, dated the 5th of *April*, 1786, assigned to *Thomas Griffith* and *James Hedges*.

By indenture, dated the 20th of *May*, 1788, the archbishop of *Canterbury*, and *Griffith* and *Hedges*, under the power of the act of Parliament demised to *Claggett*, his executors, administrators, and assigns, for a *term of 98 years; and mesne conveyances *Claggett's* interest became on or before the the 16th of *November*, 1805, vested in the plaintiff for the remainder of the term of 98 years. * 258

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The answer insisted, the lease of the 29th of *September*, 1770, having been surrendered by *Thomas Ponton* on the occasion of granting to him the lease of the 29th of *September*, 1784, and not being therefore a subsisting lease at the time of the assignment by *Thomas Ponton* to *Adams*, consequently not a subsisting lease at the time of granting the lease* of the 20th of *May*, 1788, to *Claggett*, that *Griffith* and *Hedger* had not any power under the act to grant the lease, to *Claggett*, which is consequently void. The answer stated, that there was no surrender of the lease of 1770, by writing, or otherwise than by delivering up the indenture, and accepting the lease of 1784.

Upon inspection of the records at *Lambeth*, the fact appeared, though it was noticed in the pleadings, that the lease of the 29th *September*, 1770, was delivered up on the 29th of *September*, 1777, when a new lease for 21 years was granted by the archbishop of *Canterbury* to *Thomas Ponton*, the only son and administrator of *Daniel Ponton*. The consideration recited in that lease was the surrender of the lease of 1770. The lease of 1770 remains in the record room uncancelled; and there is no written memorandum respecting any surrender. Leases for near 200 years were found, renewed at different times, before the expiration; but from the year 1749, the renewals were regularly every seven years.

Mr. *Richards* and Mr. *Kenrick*, for the plaintiff, relied upon the obvious intention of the act of Parliament,
* 259 *speaking expressly of renewals at any time or times, &c. meaning, not to make the power personal to *Daniel Ponton*, but to comprehend under the term, "assigns" any person claiming through or under him. They observed, that the renewed lease may be considered for this purpose as the original lease, which was not extinguished to all intents.(*a*)

(*a*) Co. Lit. 338. b. *Hughes* v. *Rotham*, Cro. Eliz. 302.

Mr. *Alexander* and Mr. *Johnston*, for the defendant, supported the objection, that the surrender of the lease of

1770 prevented the exercise of the power, upon the express terms of the act, admitting the object; but contending that the term "assign" could not admit so large a construction: this case not having been attended to: the words "at any time or times," referring to different leases of several premises, which might not all be demised at once.

The MASTER of the ROLLS.

December 23.

I should have been very glad to have found, that I could have formed such an opinion upon this case as might have saved the expense of an application to Parliament. But I am obliged to hold, that the lease of 1788 was not warranted by the act of Parliament, and was therefore void. The act clearly required, that the lessee under the existing lease should concur with the Archbishop in any lease to be made under the act. Neither the lessee, nor any assignee under him, has concurred in the building lease of 1788, for the lease that existed, had been surrendered upon the acceptance of a new and valid lease, that of 1777, and that was again surrendered by the acceptance of a new lease in *1784. I own, I think, I should be not construing, but supplying an omission in the act, if merely upon my knowledge of the usage to renew church leases I should hold, that Parliament had in this case said, the power given, and nominally given in words, only to the lessee in the then existing lease, should attach upon the renewed lease to the end of time. I do not know, that it was intended, but I am sure Parliament has not said it by express words, or any thing approaching to legal implication. In point of legal operation (we are now upon a legal title) each renewed lease is as much a new lease as the original one. I agree with Mr. *Kenrick*, that a renewed lease may be considered as the original lease, in endurance, to some intents, that is, for the protection of legal interests, carved out of it, which once well created, the law does not *260

Renewed lease may be considered as the original lease, enduring to some intents i. e. for the protection of legal interests carved out of it.

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permit to be destroyed. But no interest, legal or equitable, was created, when this lease was taken. There is nothing, therefore, to prevent the legal effect of taking a new lease, which is a surrender of the old one; extinguishing consequently all the power of *Daniel Ponton* under the act to grant building leases, and there is nothing, therefore, to give that power to the person not coming in by assignment from him, but deriving from him the tenant-right to claim a renewal. I am, therefore, reluctantly of opinion, that there is no title in the plaintiff to make this lease; and therefore the bill must be dismissed, but it is not a case for a dismissal with costs.

No notice was taken of the renewal in 1777, but I see by a book of leases, that was left with me, that there was a renewal in 1777.

* 261
*December* 24.

ROWE *against* ——.

Examination *de bene esse* where the witness is above the age of 70, or is the only witness to a particular fact.
Refused upon affidavit of the agent to his information from the witness, that he can prove the fact, and belief, that no other person can prove it.

A MOTION was made for an order, that several witnesses should be examined *de bene esse*, one, upon the usual affidavit, that he was above the age of 70, as to each of the others, who were to be examined to distinct facts, upon the affidavit of the agent, that he was informed by the witness, that he could prove the particular fact; and believes he is the only person who can prove it.

The Lord CHANCELLOR said, this would not do: such an affidavit would introduce this examination in every case.

Mr. *W. Ager*, in support of the motion, referred to *Shirley* v. *Earl Ferrers*,(a) and *Pearson* v. *Ward*,(b) as to the general rule; and urged the consequence of the loss of a witness in a case of pedigree.

(a) 3 *P. Wms.* 77.
(b) 2 *Dick.* 648.

The Lord CHANCELLOR.

I admit that; and do not wish to discourage this application in a proper case, being convinced that it is very useful and necessary. But it cannot be granted upon such an affidavit as this, by the agent, that he is informed by the witness, that he can prove the particular facts and to the belief of the agent, not shewing the ground of his belief, that no other person can prove it. The rule requires you to shew, that the particular person knows the fact, and the only person who knows it.

* Take the order therefore only as to the witness, who is of the age of 70, which is of course. * 262



## SIMMONS *against* GUTTERIDGE.

*December* 24.

The examination of an executor under the usual decree for an account, ought to contain an interrogatory whether he is indebted to the testator: the debt from himself being assets. Liberty was therefore given upon the suggestion of co-defendants

Legatees, without affidavit, to exhibit an interrogatory for that purpose; not to go into an account, which must be the subject of a distinct bill.

THE usual decree having been made, under a bill by legatees for an account of the personal estate against the executors, a motion was made on behalf of the defendants entitled as legatees, and also claiming the residue, as next of kin, for liberty to exhibit an interrogatory before the Master, for the examination of one of the executors, whether he was indebted to the testator. The usual examination having taken place a year ago, the Master refused to receive the interrogatory. The motion was made upon suggestion merely, without affidavit.

Mr. *W. Ager*, for the defendant, the executor, resisted the motion, insisting that a defendant cannot exhibit interrogatories for the examination of a co-defendant. Such an application was repeatedly refused by Lord *Eldon* in the case of *Allen* v. *Miller*: an account decreed against two executors, one of whom wished to shew

1806.

Simmons v. Gutteridge.

that the other had received the whole. At least such an application ought to be made upon evidence. Here is no affidavit. The inconvenience would be enormous, if each of the legatees, whatever may be their number, can exhibit interrogatories.

Mr. *Bell*, in support of the motion.

263 *Evidence is not necessary for this purpose. Any legatee may file a bill against the executor for an account, and if the real estate is charged as well as the personal, all the other legatees are parties. Every legatee therefore may exhibit interrogatories before the Master for this purpose. In the case of *Allen* v. *Miller*, two executors having been charged upon their examination by the Master, the application was made by one for an examination of the other, with the view to shew that he alone ought to be charged. The object was not to charge him in the cause, but to introduce a question entirely new; whether one should not be discharged. In the case of *Sadlier* v. Sir *Stephen Lushington*(a) the bill prayed an account against an executor; which was decreed. A motion was made that the Master should be directed to inquire into the account between the defendant and the testator, which the Master refused to do. Lord *Alvanley* said, they ought to come with a clear case for that purpose; that *prima facie* the Court was not to go so far as to unravel the account; and, as there was no evidence, but mere allegation, it stood over. The object of this application is merely to ask the question, whether this defendant was indebted to the testator, or not; and then the Master will judge whether it is proper to go farther. In such a case as this all persons are actors. Suppose after a suit instituted by one legatee, it came to the knowledge of another, that the executor was indebted to the testator upon a bond; might not the question be put, whether such a bond was not found among the personal estate.

(a) Cited from a manuscript of Mr. *Owen*.

The Lord CHANCELLOR. 



The question is only, whether the defendants, having the fixed, ascertained character of legatee, can, as* of course in every case, exhibit such an interrogatory, merely asking the plain question, whether the other defendant was indebted to the testator, not embarrassing the cause with a long and complicated account, in which case they would be required to file a bill. If this is not of course in every case there is no ground for any special order: this application being made, as was that in *Sadlier* v. Sir *Stephen Lushington*, without any special ground. A debt due by an executor to the estate of the testator, is assets,(*a*) for the same plain reason, upon which an executor who is a creditor may retain; that he cannot sue himself. The consequence seems necessary, that in every case under the usual decree against an executor an interrogatory should be pointed to the inquiry, whether he has assets in his hands, arising from a debt due by himself. If the answer to that interrogatory is, that there is a long account, and he [illegible] say the balance is against him, the Master must take that answer, and a bill must be filed. If I considered this as a special application, I could not grant it without affidavit; but considering, that these questions should be put, as part of the standing interrogatories in such cases, for the purpose of ascertaining the assets in the hands of the executor, I think this question may be asked; and therefore the interrogatory should be received. * 264

A debt due by the executor, is assets for the same reason that he may, if a creditor, retain; that he cannot sue himself.

(*a*) See *Berry* v *Usher*, *ante*, vol. ii. p. 87. and note (*a*) 90.

That reduces it to the point, whether a legatee has a right to exhibit the interrogatory. A legatee having an interest under the decree in making the estate productive, may suggest that the interrogatories are defective, with the view to introduce that interrogatory, which ought to be in every decree, for an account *against an executor. * 265
The answer to the objection of inconvenience from the possible number of legatees is, that each might file a bill. The principle is not, that any person may come at any distance of time, complaining of the interrogatories, and ex-

1806

Simmons v. Gutteridge

hibit farther interrogatories; the answer to which application would be, that he did not come at the proper time; but it proceeds upon this; that this is the interrogatory, not of the party, but of the Master: an interrogatory which the Master ought to put in every case of a decree against an executor, whether he is charged with being a debtor, as in *Sadlier* v. Sir *Stephen Lushington*, and is a debtor, to the estate, or not, as, if he is, that debt is assets. The object of the application therefore is only to make the Court advert to the circumstance that the interrogatories are defective.

This order therefore must be made, for the purpose of examining the defendant as to the debt merely, not to enter into an account; but the parties making the application must pay the costs, as they might have applied sooner.

The order pronounced was for liberty to exhibit an interrogatory, whether the defendant, the executor, was indebted to the testator upon any and what account: the interrogatory to be settled by the Master.



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*December* 24.

## *AINSLIE *against* MEDLICOTT.

Order upon a married woman to put in an answer to a bill by her husband.

AN answer not having been put in, on behalf of a married woman to a bill by her husband, a motion was made for an order, that she shall put in an answer.

Mr. *Bell*, in support of the motion, said, it was thought proper to take this course, instead of issuing an attachment in the first instance; though there are authorities, shewing, that would be regular.

The motion was not opposed; and the order was made accordingly.(*a*)

(*a*) *Sir Robert Brooks* v *Lady Brooks*, *Pr. Ch.* 24. *Ex parte Strangways*, 3 *Atk.* 478. *Mit.* 95.

1806.

December 24.

## MIDDLETON *against* DODSWELL.

Receiver appointed before answer upon affidavit of misapplication and danger to the property in the hands of an executor: the co-executors consenting to the order.

A strong case necessary against an executor.

A MOTION was made, before answer, for a receiver, upon affidavit, by the son of the testator, one of the residuary legatees, stating, that one of three executors and devisees in trust had let part of the trust premises to the barrack board at *Hull*, in his own name only, reserving a rent of 480*l.* to himself alone; that large sums had been received by him, and were not laid out upon the trusts of the will, viz. in real securities, or the public funds; that a bond had been taken in the names of two of the executors only for the produce of the sale of some shares in ships; and, that *the property in his hands is in danger of being lost or misapplied. * 267

Mr. *Leach*, in support of the motion.—Mr. *Wingfield*, for the two other executors, consented to the motion.

Mr. *Heald*, for the executor, who resisted the motion.

In the instance of an administrator, the Court does upon a very slight case appoint a receiver. But an executor is a person fixed upon by the testator. In *Jacob* v. *Hall*, a very strong case of misapplication by an executor, Lord *Eldon* refused a receiver, unless they could state some fact, shewing that the executor was utterly insolvent. The mere omission by an executor to lay out the property for a year or two is not a ground for appointing a receiver. No fact is stated, shewing that the property is in danger. In a late case at the Rolls an executor had expended above 5,000*l.* upon the funeral, and the other executors declined to interfere; the Master of the Rolls refused a receiver. In another late case, upon strong facts of misapplication and misconduct by an executor in the mode of sale, Lord

1806. Middleton v. Dodswell.

*Eldon* would not grant such an application; requiring a positive affidavit of insolvency.

Mr. *Leach*, in reply, having observed that there was no distinction between the affidavit, stating that the fund in the hands of this executor is in danger of being lost, and an affidavit of insolvency, that the cases referred to must have some farther ground, and in the case at the Rolls there was evidence of a direction by the testator to the executor
* 268 to bury him in the same manner *as his daughter had been buried, was stopped by the Court.

The Lord CHANCELLOR.

I shall grant this motion. In the case of *Dyot* v. *Morgan*, in which I this morning refused a similar application, I stated my view of this subject; that it is for the testator, not the Court, to say in whom the trust for administration of the effects shall be reposed, and, though a suit may be instituted by a party having an interest in the effects, it does not follow that the trust created by the testator, is to be set aside. But this Court does exercise a concurrent jurisdiction with the spiritual Court, upon the principle, that executors and administrators are trustees; and in that character come under the controul of this Court, by its ordinary jurisdiction. The administration is therefore not upon slight grounds to be taken from an executor. In the case I have mentioned, the testator directed his executor to pay over the rents and profits of his estate to his wife for life, and after her death to his children. Part of the estate consisted of leasehold houses; one of which the executor had let to a painter, (the same trade which the testator had carried on,) for 14 years; stating by his answer, that he intended to let the other premises. Why should he not? He was trusted by the testator, and was the hand to receive and make the

payments, for the benefit of the widow and children, and the province of management was confided to his care. 1806. Middleton v. Dodswell.

But if a manifest abuse of the trust, by wasting the property appears, which does not appear in this instance, not from a single act, but an habitual and prospective *course of dealing, bringing the property into danger, can it be said that this Court is not to treat an executor as every other trustee; and an executor may say, that, unless he is proved to be insolvent, the Court is to overlook the misapplication, and refuse a receiver? To the proposition, thus nakedly stated, the answer is obvious. Lord *Eldon's* decision must have been the same, that I shall make; that, to induce the Court to interfere, especially before answer, a strong, special ground must be made. It is true, the time is not come, at which he is bound to put in an answer; but he appears by counsel, and comments upon the affidavit, though he makes no affidavit himself. Yet if it rested there, I should not grant the motion. I ground the order upon this; that there is what may be considered, though perhaps not the strongest way of expressing it, an affidavit, that the property is in danger from insolvency, existing or expected; by which only it can be in danger. Another ground is, that the testator did not trust this executor alone, but in conjunction with two other persons, who are also executors and devisees in trust. Their consent gives great strength to the application. Agreeing, therefore, that the administration is not to be taken from an executor upon slight grounds, I must in this case make the order for a receiver. * 269

1807.

# *EX PARTE VERNON.

January 13. Though an order might be made upon part of a petition in bankruptcy, viz. for interest against an assignee, who did not pay into the bank, appointed by the creditors, under the act of Parliament; the petition also praying his removal, with much groundless imputation, the whole was dismissed with costs; without prejudice to another petition, confined to the proper object.

THE prayer of this petition was, that an assignee under a commission of bankruptcy may be removed; and that he may be charged with interest upon sums received by him in the year 1805, in cash and bills, upon a sale of the effects, which he had not paid into the bank appointed by the creditors according to the act of Parliament.(a)

Mr. *Cooke*, in support of the petition, admitting the conduct of this assignee to be fair, relied upon the established rule, that an assignee, not pursuing the direction of the creditors under the act, to pay the money into the bank appointed by them, shall pay interest; observing, that part of the produce of the sale was actually received in cash. Motives of convenience, as that it will be wanted in a short time, cannot be admitted as an excuse for keeping money; a precedent, that assignees will be too ready to follow. Supposing, he did not make interest, a trader has advantage in keeping money at his own banker's, by increasing his credit.(b)

The *Solicitor-General*, for the assignee, as to that part of the petition, which prayed the removal of this assignee, stated several circumstances from the affidavits, shewing that his conduct was meritorious.

The Lord CHANCELLOR.

One object of this petition is proper. An account ought
*271 to be taken to ascertain the periods, at which *the assignee had property in his hands to the amount of 100*l*. It is

(a) Stat. 5. *Geo.* II. c. 30. s. 32. (b) *Ex parte Hilliard*, *ante*, vol. 1. p. 89.

enough to say, the act of Parliament has positively directed that when the property reaches that amount, it shall be paid into the bank appointed by the creditors. But as to the rest of the petition, there is nothing reprehensible in the conduct of this assignee; and there are several circumstances much in his favour. He sold the property at a credit of four months, which in that part of the country was advantageous, occasioning no risk to the estate, taking ample security, and all these circumstances were known to the petitioner, who suggested a trifling mistake, to the amount of about 20*l.* and refusing to look at the accounts and vouchers which were offered, a year afterwards he makes the complaint.

1807. Ex parte Vernon.

Under these circumstances this petition ought to have been confined to the mere object of the act of Parliament. Therefore, though an order might be made upon that part of the petition, yet, seeing a spirit of injustice mixed with it, and desiring to put a stop to vexatious petitions, I shall dismiss the whole petition with costs, and this petitioner, or any other person, may present another petition for the single purpose, at which the act was pointed.



## EX PARTE LEMAN.
## EX PARTE COOKE.

*January 17.*

THE first of these petitions was presented by two assignees under a commission of bankruptcy against *James Emerson*, and stated, that *Samuel Lowton*, *the third assignee, had possessed the bankrupt's effects to the amount of 165*l.* which he neglected to pay to the banker appointed by the creditors, that he did not attend a meeting appointed for the purpose of investigating the accounts of the assignees; that he absented himself from

Assignee in bankruptcy removed, and the assignment and bargain and sale vacated, except as to purchasers.

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1807.

Ex parte Leman.

his residence and business in *Bristol*, that his affairs are in an embarrassed state, and the petitioners apprehend, the balance in his hands is in danger of being lost. The petition therefore was presented with the assent of the creditors at a meeting, called for the purpose, praying that *Lowton* may be removed from being assignee; and that he and all other proper and necessary parties, may execute proper conveyances and assignments of the bankrupt's real and personal estate to the petitioners, or some other assignees, and that he may account, &c.

The circumstances alleged by the petition were supported by affidavits. On the 11th of *August*, an order was made, that service of the petition and of that order on *Lowton*, by leaving the same at his last place of residence, should be deemed good service, which was done accordingly.

The other petition was presented in another bankruptcy, for the same purpose. Some of the real estates had been sold, and the purchasers were served, and appeared.

Mr. *Cooke* and Mr. *Rupell*, in support of the petitions, contended, that the bargain and sale should be vacated: the statute of *Geo.* II (a) relating to bargains and sales, though those words are not used, the word "estate" being in the act. In *Ex parte Bainbridge*,(b) all the *assignees were dead: *Peter Robinson*, the survivor of them, left a will, and appointed executors, and also left an infant son, *Peter Robinson:* on the 13th of *January*, 1801, the petitioners were chosen assignees; and the petition prayed, that the bargain and sale and enrolment may be vacated. The order was, that the bargain and sale of the bankrupt's real estate, made to the former assignees, chosen under the commission, all since deceased, and also the enrolment thereof, be vacated, so far as relates

(a) Stat 5 Geo II c. 30 s. 31

(b) *Ante*, vol 6. p 451.

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1807. Ex parte Leman.

to property undisposed of, and be forthwith delivered up to the commissioners to be cancelled; and that the commissioners do forthwith execute a new bargain and sale of the bankrupt's real estate, remaining undisposed of, to the petitioners, as the assignees duly chosen by the creditors under the commission.

The Lord CHANCELLOR, upon the authority of that case, made an order in the petition *Ex parte Leman*, that *Lowton* should be removed, and the assignment and bargain and sale vacated, except as to any sales that had been made of the bankrupt's real estate; that the creditors should proceed to a new choice of assignees; and that an assignment and bargain and sale should be made to the new assignees, and an account, as prayed by the petition, and payment by *Lowton*, &c.

A similar order was made upon the other petition.

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## *EX PARTE GREY.

*January*, 12, 13

THE object of this petition in bankruptcy was to remove *Moffat*, an assignee, who was permanently resident in *Scotland*.

Assignee in bankruptcy, permanently resident in *Scotland*, removed.

The *Solicitor-General* in support of the petition, cited a late instance of such an order, *Ex parte Hoskins*.(a)

(a) *Feb.* 21, 1806

The Lord CHANCELLOR.

*Feb.* 13

I am clearly of opinion, that the assignee ought to be removed. He is a trustee both for the bankrupt and the creditors. Yet, whilst he is resident in *Scotland*, I have no hold over him; and can reach him with no process.

1806 December 22, 23. 1807. January 7.

## LUCAS *against* LUCAS.

No exceptions to an infant's answer In that case, therefore, cause against dissolving an injunction must be upon the merits, according to the answer. and though it was manifestly insufficient, the injunction was dissolved

AN injunction having been obtained, restraining proceedings in an action of ejectment, brought on behalf of an infant, by his guardian, a motion was made to dissolve the injunction upon the answer.

Mr. *Horne*, for the plaintiff, undertook to shew exceptions for cause.

*Mr. *Richards* and Mr. *Daniel*, for the defendant, objected upon the general practice, that exceptions cannot be taken to an infant's answer: *Copeland* v. *Wheeler*.(a)

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Mr. *Horne*, for the plaintiff, undertook to shew cause upon the merits.

1807. *January* 7.

The case made by the bill was, that the life of the defendant was put in merely as a trustee when he was at the age of two years, by his grandfather, who paid the fine, with undisturbed possession since 1790.

Mr. *Horne*, for the plaintiff, admitting, that though the answer of an infant may be grossly insufficient, the plaintiff cannot by taking exceptions compel a discovery from the infant, but must prove his case, contended, that the rule goes no farther, and an injunction cannot be dissolved upon an answer manifestly insufficient, and not meeting the equity of the bill, as in this instance simply stating, that the defendant does not know, that the fine was paid by the plaintiff.

Mr. *Richards* and Mr. *Daniel*, for the defendant, insisted, that the plaintiff was bound to make out from the answer, the proposition, that the estate being bought with his money, the defendant is a trustee.

(a) 4 *Bro. C. C.* 256.

The Lord CHANCELLOR said, that upon the bill and answer the Court could not see the trust, and therefore could not interfere with the legal title. 1807. Lucas v. Lucas.

The injunction was dissolved.



*COPORATION OF CARLISLE *against* WILSON. * 276 *January* 17. 20.

Concurrent jurisdiction of a Court of Equity in account, though a legal title; the right being first established at law; originally assumed under a sound discretion; where an action would not give so compleat a remedy.

THE bill stating the right of the Corporation of *Carlisle* to toll-thorough for all merchandize carried through that city, originally levied upon goods, carried on the backs of men and horses, afterwards in waggons and carts; that great quantities of merchandize are conveyed through the kingdom in stage-coaches; that the defendant has refused to pay the toll accrued due to the plaintiffs for goods conveyed by the stage-coaches, of which they are proprietors; that in consequence of an agreement to try the right, an action was brought in the year 1802; which was tried in *August*, 1804, and a verdict was found for the plaintiffs with nominal damages. The bill prayed an account of the tolls, confining it to six years.

General demurrer, where the plaintiff is not entitled to relief.

To this bill a general demurrer was put in.

Mr. *Alexander*, and Mr. *Bell*, in support of the demurrer.

The question upon this demurrer is, whether a bill lies for an account of tolls, levied in this way. A repetition of a merely legal demand cannot constitute the subject of an account in equity. There is no instance of a bill for such a purpose. Upon the same principle an account of common turnpike tolls might be demanded.

The demurrer is general upon the rule, now established by several cases, following the decision of Lord *Thurlow*,

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that though the plaintiff may be entitled to discovery, if he is not entitled to relief, *a general demurrer lies, contrary to the former course.(a)

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(a) See Baker v Mellish, ante, vol. 10 p. 544 the references in the note 553 and Gordon v. Simpkinson, ante, vol 11. p. 509.

The *Solicitor-General*, and Mr. *Hart*, for the bill.

The right to toll being established by the verdict in an action brought by agreement, for the mere purpose of trying the right, the defendants are accounting parties for all sums, which ought to have been paid for toll for the last six years. This bill is sustained by the principle of preventing multiplicity of suits. The defendants are to render a long account, which the plaintiffs may surcharge and falsify. The objection that the bill should have sought a discovery only, upon which the plaintiffs should have proceeded at law, is the inconvenience of going through such an account before a jury, applying all the evidence that might be used to surcharge and falsify. Upon the head of account, Courts of Equity have a concurrent jurisdiction, and the suit by bill in equity has been found a very convenient substitute for the action *quod computet*, where the subject is of a complicated nature and liable to the check by surcharging and falsifying the right, if a legal demand being first established at law. A bill similar to this was filed in the Court of Exchequer in which suit, the title not having been established at law, an issue was directed, and afterwards an account was decreed. In *Northleigh* v. *Luscombe*,(b) *The City of London* v. *Perkins*,(c) and *The City of London* v. *Ainsley*,(d) such an objection as this was not taken.

(b) Amb 612
(c) 4 Bro P C 157
(d) 1 Anstr 158

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*Mr. *Alexander* in reply.

In *The City of London* v. *Ainsley* the allegation was, that the defendant, being a freeman of the City, had imported coals, the property of persons who were not freemen, and had received the toll, which he had not paid to the plaintiffs. This jurisdiction is exercised only, where an ar-

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Corporation of Carlisle v. Wilson.

rear arises from the nature of the demand; or, where there are complicated and cross demands. An account of quit-rents cannot be had in this Court.(a) Experiments of that sort have been made and without success. The case of *Pulteney* v. *Warren*,(b) proves how the account of rents and profits is limited. This is a toll not upon the value of the goods but upon each vehicle, according to the number of horses, and may be levied as a common turnpike toll.

(a) *Bouverie* v. *Prentice*, 1 *Bro. C.C.* 200.
(b) *Ante*, vol. 6 p. 73.

*January* 29.

The Lord CHANCELLOR.

The question is, whether upon the facts stated by this bill, this Court ought to decree an account. The objection is, that the right to take these tolls is undoubtedly a merely legal right, that the plaintiffs therefore may have a discovery, and having obtained that, cannot also have relief; but should use the discovery in an action, which undoubtedly might be brought. The principle upon which Courts of Equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or cannot give so complete a remedy, as a Court of Equity, and *by degrees Courts of Equity assumed a concurrent jurisdiction in cases of account, for it cannot be maintained, that this Court interferes only when no remedy can be had at law. The contrary is notorious. The same species of relief is given at law in the action of account as under a bill in this Court, but the great advantage of the latter, and the difficulty and delay when the account comes before auditors, has brought that action into disuse, as is observed by Lord *Hardwicke* in *Ex parte Bax*.(a)

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(a) 2 *Ves.* 388

The proposition asserted against this bill, is, that this Court ought to refuse to interfere by directing an account; if any action for money had and received, or *indebitatus assumpsit* can be maintained. That proposition cannot be supported. In *Lewes* v. *Sutton*,(b) the Chancellor's doubt

(b) *Ante*, vol. 5 p. 683. See page 687

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was, not whether an account could be decreed; but whether the plaintiff could recover at law. The proposition is, not that an account may be decreed in every case, where an action for money had and received, or *indebitatus assumpsit* may be brought, and certainly *indebitatus assumpsit* lies for tolls; but, that where the subject cannot be so well investigated in those actions, this Court exercises a sound discretion in decreeing an account. It is true, in *Milbourn* v. *Fisher*,(c) there was no demurrer; but, if the proposition that an account cannot be decreed upon such a subject, is so clear, I cannot think the Court would have done what was done in that instance, and in the case before the House of Lords;(d) where no question was made as to the jurisdiction of a Court of Equity, which upon those cases must be considered *established; a concurrent jurisdiction with a Court of Law upon the subject of account; that therefore, though an action might be maintained, yet, if it appears, it would not be tried without great difficulty, and the verdict could not, from the nature of the case, be equally satisfactory with the proceedings under a decree, an account shall be decreed.

*Indebitatus assumpsit* lies for tolls.

(c) Ante, vol. 5. p. 685. n.

(d) *The City of London* v. *Perkins*, 4 Bro. P. C. 157.

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The objection, that these plaintiffs omitted to exert their right to take a distress, is answered by the circumstances. These tolls were originally levied upon goods, carried by men and horses, afterwards upon the owners of waggons and carts; and since, in consequence of the improvement of the roads, the claim is made upon the proprietors of stage-coaches; but, the right being disputed, it was fairly considered, that to enforce the payment by distress, would have been too strong a measure. That led to the agreement to try the right, and, in the mean time, to forbear to exercise it. That suit being merely to try the right, nominal damages were taken. How can a case of this kind be tried at the assises; an account, to be surcharged, upon which every inhabitant of *Carlisle* might be examined?

Overrule the demurrer.

1807.

## KIRK *against* KIRK.

*January* 20 25.

Order before publication for re examining a witness upon his affidavit, that through mistake as to the time he submitted to be examined without looking at papers, which enable him to answer more fully and precisely.

THE plaintiff and defendant were brothers; and had carried on business as nursery-men. Differences *arising between them, they agreed to dissolve the partnership; and with that view the stock was valued. The bill prayed an account, charging that the stock had been undervalued, and that it would appear by a printed book, that it was of a greater value than that at which it was taken.

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A motion was made before publication, that the defendant may be at liberty to re-examine *James Grey*, and the plaintiff to cross-examine him again, upon an affidavit by the witness, stating, that being informed that the 19th of *November*, the day on which he was examined, was the last day on which any witness could be examined, he on that account only submitted to be examined at that time; and that, when he returned home, he looked into a variety of memorandums, and other documents, from which he found, that several questions, to which he had in his examination stated that he could not depose, and others which he had answered as to his belief only, he could with the assistance of those papers have answered with precision and accuracy; and particularly as to the book, to which the inquiry was directed.

Mr. *Thomson*, in support of the motion, cited the *Practical Register*;(a) observing that the application was recent, before publication; and the Court, exercising a discretion under the circumstances upon the point, whether it was proper that a witness should be re-examined, might make the order.

(a) Prac. Reg. 196. 420.

Mr. *Cooke*, for the plaintiff.

There is no instance of permitting a witness to be examined a second time upon the same interrogatory *before publication. If after publication a re-examination is ne- * 282

1807 cessary, the case to which the passages cited from the *Practical Register* apply, the course is generally a reference to the Master to settle the interrogatories, upon which the witness shall be re-examined. This is directly contrary to Lord *Clarendon's* order.(*a*) The examiner is positively ordered, if the interrogatory has been read, by no means to permit the witness to leave his office, until the examination is completed. The effect of this would be to defeat all the caution of the Court to prevent communication between the witness and the parties; giving the witness an opportunity of communication, after having heard all the interrogatories on both sides, and having gone through the whole examination, and of new modelling his evidence accordingly. This witness alleges, that he was mistaken; which is the excepted case put in the *Practical Register*. It is not true, that the 19th of *November* was the last day upon which he might have been examined. Publication would not have passed before the 22d of *November*. If, therefore, he had stated that he was not prepared, the examiner would have appointed another day. Upon the 21st, the plaintiff moved to enlarge publication until the last day of the term, under which order the cause now stands. Stating that he discovered that his examination was defective, upon his return home, the application was delayed until the last seal after the term, for which day the notice was given. A similar application, before publication, in *Ingram* v. *Mitchell*(*b*) was refused. The evidence should therefore remain as it is, until publication has passed, when it will appear whether this supposed defect is material or not; and, if material, *the proper course is by exhibiting interrogatories, without giving the witness an opportunity of going through the examination again, after having heard every interrogatory, and perhaps after a communication with the party.

Kirk v. Kirk.

(*a*) Rules and orders 41. A. Larger collection of orders, No. 105.

(*b*) *Ante*, vol. 5 p. 297.

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Mr. *Thomson*, in reply. 1807.

Kirk v. Kirk.

The allegation of this witness is, not that he was mistaken, but that he did not give his evidence. The court is properly more jealous of an application to examine after publication. The effect of shutting out perhaps the only material evidence may be very prejudicial. The orders of Lord *Clarendon* are general regulations of practice, and cannot govern a special case.

The Lord CHANCELLOR.

The Court is properly very jealous of applications of this nature, from the apprehension of affording opportunity to practise upon witnesses. On the other hand, it would be destructive of justice to shut out the truth, if this is not an attempt at imposition, but by the effect of accident the witness has not stated in his examination, that to which he is now disposed to swear. In some way that must be brought under the consideration of the Court.

*January* 24

Mr. *Thomson*, for the defendant, cited an order for re-examination of a witness before the commissioners in a late case, *Mitchell* v. *Rabbits*.(a) Against a bill for tithes a modus was set up. An old man, being examined as to certain tenements, for which he had paid a modus, stated, that he paid for four tenements. *In some conversation afterwards he was reminded, that he had paid for five tenements; and upon affidavits, shewing that to be the result of fair recollection, the order was made. * 284

(a) In the Court of Exchequer, after *Michaelmas* Term, 1806.

These applications are rare; as the defect is seldom observed until after publication. The witness may be reminded even by the party, that he had stated a fact wrong.

1807.

Kirk v. Kirk.

Mr. *Roupell*, who obtained that order, said, the Court expressed considerable doubt upon it.

The Lord CHANCELLOR.

Evidence that a witness upon recollection declared, he had sworn what was not true, and went back, offering to correct it, but too late admitted upon an indictment for perjury.

I think this application must be granted. The Court is indulgent in such cases. I remember an instance of an indictment for perjury. A witness, after his examination, having quitted the Court, exclaimed, that he had sworn something that was not true. He went back into Court, stating that, and offering to correct it, but the cause was over. He was indicted for perjury upon the evidence he had given, and the question was, whether evidence of what he had said afterwards might be given, and the Court held clearly that it might, and the effect of refusing it would be the greatest injustice.

The order was made for re-examining the witness upon those interrogatories to which the affidavit related.(a)

(a) See the next case.

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## *KIRK *against* KIRK.

March 7.

Re-examination of a witness after publication, upon his own application and affidavit, to correct mistake, but confined to that, the Court not permitting the whole deposition to be suppressed, and an entirely new examination.

A MOTION was made on the part of *Reginald Whitley*, a witness examined in this cause, that his deposition may be suppressed, and that he may be re-examined by the plaintiff, and cross-examined by the defendant, upon his own affidavit, stating that being one of the persons, who had valued the stock of the plaintiff and defendant, upon the dissolution of their partnership, as nursery-men, he went to the plaintiff's solicitor, with a view to prepare himself for his examination, by obtaining a copy of the interrogatories, but was informed that could not be; that a printed book, containing an account of the stock, made some years ago, was then for the first time produced to him, for the purpose of comparing with that book the

valuation, which he had made in writing in another book. The affidavit then stated the manner in which the witness compared the books; the solicitor reading from the printed book to the witness, who had the other; and that the effect of that mode of comparing them is, that there are many inaccuracies in his depositions; the examination being according to the printed book. The affidavit did not state any instances; but one was pointed out at the bar, a mistake between trees "*bedded*" and "*budded*," the value of which is different.

Mr. *Perceval*, in support of the motion, said, the effect of this was, that the witness, meaning to depose to the accuracy of the written book, has deposed to the printed book.

Mr. *Thomson*, for the defendant, opposed the motion.

*This sort of application is always entertained with great caution, and upon some distinct particular point; as to which the meaning of the witness has not been correctly taken down by the examiner. A former application for the re-examination of a witness in this cause(a) was recent, before publication: the affidavit stating distinctly the mistake, and the effect of it upon the evidence; and the order giving leave to re-examine that witness, was qualified and restrained to the particulars in the affidavit. This application is made after publication; and it is to suppress all the evidence of this witness, and that he may be examined *de novo*. There may be no objection to permit him to give an explanation, but this application is too large. * 286

(a) See the preceding case

Mr. *Cooke*, for the plaintiff, also resisted the motion in the full extent, insisting, that the witness making such an application, ought to state the particular error

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and the cause; but the deposition could not be suppressed altogether.

The Lord CHANCELLOR.

"Certainly not. If the particular mistake now pointed out at the bar, had occurred in the evidence of a witness at law, who was afterwards informed of it, he would be entitled to correct that specific mistake, but he could not allege mistake generally; and insist that the Judge should not sum up the evidence, until he should be examined entirely again. If that were permitted, he might throw in the most pernicious alteration of his evidence. But nothing is more easy than to correct this mistake, by letting the witness go before the examiner, in order that

* 287 his evidence, as it *refers to the printed book, may be made consistent with the written book, to which he intended to swear.

The order was, that the witness shall be re-examined by the plaintiff, and cross-examined by the defendant, upon the same interrogatories that apply to the printed book.



HEARNE *against* TENANT.

*January* 20, 27.

Lapse of time, if not an essential object of a contract, is no objection to a specific performance.

Injunction upon that, combined with other circumstances.

A MOTION was made, upon the answer, for an injunction to restrain an ejectment, under the following circumstances:

The plaintiff was assignee of the lease of a house, demised by the defendant. Upon the expiration of that lease a treaty for a new one took place, the defendant insisting upon a rent of 84*l.* and the sum of 1,000 guineas.

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The plaintiff, after some fruitless endeavours to procure an abatement, consented to give that rent and premium, and, the plaintiff requesting the defendant to put down the negotiation upon paper, a memorandum was put down by the defendant in writing, dated the 23d of *October*, expressing that the lease was to be granted for 21 years, to commence upon the expiration of the old lease, "upon "condition" of the plaintiff's paying on or before the end of the month, 1,000 guineas. Of that memorandum two copies were signed; the plaintiff taking one, the defendant the other. After the expiration of the time mentioned in the memorandum for payment of the 1,000 *guineas, * 288
the plaintiff calling upon the defendant, apologized for not bringing the money: the defendant asked, if he had the memorandum with him: the plaintiff produced it, the defendant taking it, observed, that the time for payment was expired, and therefore the memorandums were of no use, and it was better to destroy them; and he then took the other out of a bureau, and tore them both.

The answer, as to that transaction, stated, that the plaintiff did not express disapprobation, nor did he say he agreed to it, but he entreated a week or a fortnight farther time: but whether the plaintiff had any suspicion of the defendant's views in making such request, or why he acceded to it, the defendant cannot set forth.

The *Solicitor-General* and Mr *Trower*, in support of the motion, cited *Williams* v. *Thompson*, from Mr. *Newland's Treatise on Contracts*, (*a*) and referred generally to *Gregson* v. *Riddle*, (*b*) and the other cases upon lapse of time.

(*a*) Newland, on Contracts, 238
(*b*) Ibid 239.

Mr. *Perceval* and Mr. *Perry*, for the defendant.

The Lord CHANCELLOR.

January 27.

The question is, whether under the circumstances appearing upon this answer, the injunction should be conti-

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nued to the hearing. The impression upon my mind is, that the Court has gone farther than it ought to go in these cases. Upon looking into the whole of this case as it now stands, my opinion is, that I ought to continue the injunction to the hearing. *The principle, upon which the Court acts, is now upon all the authorities brought to the true standard; that though the party has not a title in law, as he has not complied with the terms, so as to entitle him to an action, as to the time, for instance, yet, if the time, though introduced, as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a Court of Equity will compel the execution of the contract, upon this ground, that the one party is ready to perform, and the other may have a performance, in substance, if he will permit it.(a)

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Principle of specific performance, that the contract may be performed in substance; though the terms are not strictly complied with, so as to give the right at law.

(a) See the last cases upon this subject, *Halsey* v. *Grant*, *Alley* v. *Deschamps*, *ante*, 73. 225.

In the course of the negotiation between these parties, previous to the memorandum, nothing was in difference but the amount of the sum, the premium upon renewal; nothing as to time appears to have been in contemplation; nothing to shew that payment at a particular day was the object. It would be rash in this stage of the cause upon the words of the memorandum, as represented by the answer, the defendant stating, that he cannot set it forth more particularly, the memorandum being destroyed, to decide, that the payment must be taken to be a condition precedent, as it might be, if that stipulation was inserted by the consent of both parties, the consequence of previous negotiation. It does not appear that the defendant, who made this memorandum himself, had any authority to put down any time; and the nature of the transaction does not look like it. It does not appear that he *had any pressing occasion for the money at a particular time. Then, his conduct in destroying the papers was not such

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as will entitle me to say in the middle of the cause, that this is a fair proceeding.

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Combining all the circumstances, I think this injunction must be granted until the hearing.

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## PEMBERTON against PEMBERTON.

1805. *May* 13, 15, 18. Before Lord *Eldon*. 1805 *January* 23, 26, 27, 28. Before Lord *Erskine*.

Two wills, originally duplicates; but one altered and cancelled and a codicil, without date. After three verdicts for the devisee, the Lord Chancellor being satisfied with the result of the third trial, refused a fourth.

IN this cause, upon a bill by the sisters of the testator, *Smith Owen*, claiming as co-heiresses at law, against the devisee, an issue, *devisavit vel non*, was directed, which was tried in the Court of Common Pleas before Lord Chief Justice *Mansfield*, and a verdict was found, establishing the will. A motion for a new trial was granted by Lord *Eldon*. Upon the second trial, also in the Court of Common Pleas, before Lord Chief Justice *Mansfield*, the verdict was in favour of the will. Another application for a new trial came before Lord *Eldon*, under the following circumstances appearing on the Judge's report.

At the death of the testator, in 1804, three instruments were found: two wills, bearing the same date, the 20th of *December*, 1797, originally duplicates; but one altered, and cancelled: instrument did not touch the principal devise. One alteration was of a legacy to Mrs. *Carey* of 1,000*l.* which was altered to 3,000*l.* and that sum was put in the margin, inclosed in a circle, *with the same date as that of the will. Another alteration was in a legacy, at the age of 21 or marriage, by striking out the words "or marriage." These legacies were originally charged upon the real estate. There were some other alterations by erasure, and an addition at the bottom, which was afterwards cut off. One of the duplicates was taken away immediately upon the execution by Mr. * 291

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*Pemberton*, who had prepared the will. The testator declared, that his instructions were mistaken by *Pemberton* in putting down 1,000*l.* only instead of 3,000*l.* for Mrs. *Carey*. In *January*, 1799, the testator wrote to Mr. *Pemberton* at *Shrewsbury*, desiring him to bring over the counter-part of his will, as he wished to make some addition to it, which he would do, when he went to town. That part was brought to him accordingly on the last day of *January*.

Mrs. *Carey* stated, that in 1798, she saw the testator make erasures in that part of his will, which appeared cancelled. She did not see that instrument again until the year 1803. In *July* in that year, taking down some books from a book-case in the library, of which she had one key, and the testator another, she found the uncancelled part of the will among the books, which she took down, and placed upon the sofa. Soon afterwards, company being expected, she and the testator removed the books and that instrument with them from the sofa into a closet; and in a few days she put them back again. In *September*, when she was in the library with the testator and two other persons, the testator opened the book-case, and took out the cancelled instrument; and, pointing to the margin, said, "See how rich you would have been, if "I had not destroyed my will." He did not appear to be looking paticularly for it. He proposed to throw it into the fire, but was prevented by her desiring to have it for thread-paper.

292 *The cancelled and the uncancelled parts of the will were found upon the testator's death in the book-case. The codicil was found on a drawer in another room. That instrument, though not dated, was proved to have been executed about *Christmas*, 1800. It was declared to be a codicil to his will, and reciting, that since making his will he had purchased some estate, devised those estates; and concluded by ratifying and confirming his will.

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Evidence was produced on both sides of declarations by the testator. The circumstance, that some evidence given by the heirs upon the first trial, was not produced upon the second, was noticed by the report of the Lord Chief Justice; and it was contended by the devisee, upon the authority of *Standen* v. *Edwards*,(a) that upon the application for a new trial no use could be made of evidence that had been withheld.

(a) *Ante*, vol 1 p. 133

Serjeant *Shepherd*, Mr. *Richards*, Serjeant *Best*, Mr. *Dauncy*, and Mr. *Benyon*, in support of the motion for a new trial.

The law, as laid down by the Lord Chief Justice, is perfectly correct. The testator by the cancellation of the duplicate utterly destroyed the will; unless it could be proved, that when he did that act, he had no such intention; and that inference is not supported by any evidence, from any thing done or said by the testator at the time, previous or subsequent. The act must have its natural effect; unless explained or contradicted. The proposition, correctly stated, is, not that where a will is executed in duplicate, each part constitutes the will, but that each is evidence of the will, *the mind of the testator, * 293
which, to whatever extent he may multiply the evidence of it, remains single and indivisible. The act of cancellation therefore being evidence of an intention to revoke the will, the devisee must either by some subsequent act set up that will again, or produce a new will; or shew from circumstances attending the act, that the testator, though he physically destroyed that paper, did not intend to destroy the will he previously had. The authorities, from Sir *Edward Seymour's* case (a) down to *Burtonshaw* v. *Gilbert*,(b) support the law, as laid down by the Judge; that the act of cancellation, standing alone, and unexplained, is a revocation of the whole will; and, to controul that effect, satisfactory evidence is required, that the testator did not by that act intend to produce the ef-

(a) Cited in *Onions* v. *Tyrer*, 1 P. Wms. 344 *Pre Ch.* 459 2 *Vern.* 743

(b) *Cowp.* 49

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fect, which the law gives it. All the cases where the act of cancellation has not had that effect, have contained circumstances, shewing, either that he did not mean to destroy the paper; or that he meant to destroy it with a view, not to destroy his will, but to some other purpose; in the absence of which he would not have left that paper entire.* The principle is, that the heir is not to be disinherited by conjecture, surmise, or any thing uncertain.

Upon the evidence of Mrs. *Carey*, it is clear he did intend to destroy his will, and not that parchment merely. Can the words he used to her be represented as equivocal? They are an express, clear declaration as to the act he had done, and the effect of it. Upon the rest of the evidence also the preponderance is greatly against the verdict. He would have thrown that part into the fire, if
*294 not prevented by her desiring to *have it for thread-papers. The other duplicate was not taken care of, or particularly noticed by him. If that had been found carefully preserved with the muniments of his estate, some inference might be collected: but it was left loose among some books upon a shelf in his library: it was found by accident, when he and Mrs. *Carey* were taking down some books: it was thrown into a closet with the books; and it does not appear, that he ever saw or heard of it from that time. At what moment can it be said, that he considered the uncancelled instrument as his will, in opposition to that which was cancelled?

As to the codicil, it was not found with the instrument, to which it is supposed to belong. The Judge stated correctly to the Jury, that it must follow the fate of the principal.

Serjeant *Williams*, Mr. *Romilly*, Mr. *Mills*, Serjeant *Lens*, Serjeant *Bayley*, Mr. *Hart*, and Mr. *Saxton*, opposed the motion.

...ever may be the law as to the effect of the cancellation of a duplicate, as cancelling both instruments, it does not apply to this case. It was not contended for the devisee, that this testator meant to destroy only that particular parchment, It was not disputed, that he meant to destroy that testamentary disposition. The real question was, whether the paper destroyed was a duplicate: the devisee contending, that it was not; that the paper destroyed was a paper, not the same, and of a different effect. The conclusion of the Jury is perfectly right; but whether it is right, or not, the question is one, that they only were competent to decide; and which they have decided upon all the evidence, that it was thought proper to *produce; with a direction from the Judge, of which there is no complaint. * 295

It is not therefore very important upon this occasion to discuss the general proposition, upon which the case of the heir was rested; that the cancellation of one part of the will, executed in duplicate, having effect as a cancellation of both, throws the burthen of proof upon the devisee; a proposition not well founded. On the contrary, upon the authorities the cancellation of one part is not *prima facie* a cancellation of both, but the heir at law must shew, *quo animo* the act was done; *Onions* v *Tyrer*.(a) *Swinburne*,(b) putting several cases, in which a testament is not hurt by cancellation, states this, as one as exception; where there are several papers of one tenor, each containing the whole testament, the defacing or cancelling some of them does not hurt the testament, unless it be true that the testator's mind was contrary, and that is the necessary conclusion; which appears also from *Burtonshaw* v. *Gilbert*;(c) Lord *Mansfield* going into the circumstances, shewing the intention to cancel both; considering the act in itself equivocal. Sir *Ed. Seymour's* case(*d*) was a clear intention to cancel.

(a) 1 P Wms. 344 (See Mr. Cox's note.) 2 Vern 743. Prec Ch. 459

(b) Ed 7. vol 3. p 990, 1, 2.

(c) Cowp 49.

(d) Stated in *Onions* v *Tyer*, 1 P. Wms. 344 2 Vern. 743. Prec. Ch. 459.

It is true, this instrument was according to the evidence upon a shelf; but in a book-case generally locked, of

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which only the testator and Mrs. *Carey* had keys; and it was behind books. It might be placed in that situation, with the view, that no one but themselves should know where to find it. The representation, *that it was thrown
*296 upon a shelf, as a thing of no consequence, is not accurate. Though it does not appear distinctly, that he had seen the uncancelled instrument, the Jury are justified by the evidence in presuming that he knew he was in possession of that instrument, that he had an instrument containing permanent evidence of his testamentary disposition, and that the only evidence of his intention to revoke was the testimony of a person, who might die before him. A material distinction, taking the law to be, that the cancellation of one part is *prima facie* evidence of an intention to destroy the whole, throwing the burthen upon the devisee, is, that it can be so only where the testator has not both the instruments in his possession; if he has, it is at least as difficult to account for the preservation of one, if he meant to die intestate, as for the destruction of one, if he meant to leave a testamentary disposition; in truth, the presumption is strong against the proposition of the heir; as, the object in having duplicates being only to have one in a different possession, the very purpose of getting it back may suggest to him to destroy one. In all the cases it is assumed, that the duplicate was in a different possession. Can he be supposed to intend to trust his intention to die intestate to the declaration he had made to a single person, a person interested to withhold that evidence, having in his possession an instrument regularly executed and attested as his will? That evidence has application only to the instrument produced. He desires her, not to take notice of a legacy, but to observe how great is his bounty towards her, an expression, that cannot be applied to the other instrument, giving her a legacy of only one third of the amount. This construction is farther fortified by the alterations made in the instrument, afterwards cancelled, and not in the other. The object
*297 might be to destroy the alterations, *leaving the will to stand as originally framed. The proposition, that the

cancellation of one is the cancellation of the other, requires that the instruments should be precisely the same. But what reason can be assigned for leaving one part untouched, meaning to cancel the whole?

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Serjeant *Shepherd*, in reply, was stopped by the Court.

The Lord CHANCELLOR.(*a*)

(*a*) Lord Eldon

The ground, upon which my opinion that a new trial ought to be granted in this cause rests, is one that cannot in the least degree prejudice the conclusion, to which the Court ought to come. My opinion is not formed upon the supposition that the verdict is wrong, or right, nor does it interfere with that conclusion, which upon subjects of this nature I take to be entirely with the Jury, giving due attention to the topics of law, properly stated to them by the Judge. That is particularly proper in a case, where a Court of Equity is dealing with a will; as to which the administration of equity is very different from that in other cases; upon most of which this Court has jurisdiction to determine upon inferences of fact, as well as doctrine of equity. But the authority to declare, what is, and what is not a man's last will, is denied to this Court.(*b*)

A Court of Equity has no jurisdiction to declare, what is or is not a man's last will

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This bill is rather new in principle. I have no doubt, that heirs at law, entitled to the estates, of *which their ancestors were seised, though only in equity, and therefore not having the means of proceeding at law, may come into equity, merely to recover the possession of those estates, and to have the deeds delivered up. I will not say, that in some cases they may not apply to have a will delivered up, as an instrument that ought not to vex their

The course upon a bill by an heir, impeaching a will, is to direct him to bring an ejectment, removing obstacles from terms, &c. Whether an issue proper upon such a bill, *Quære*

(*b*) *Kenrick* v. *Bransby*, 3 *Bro. P. C.* 358. See *ante*, vol 5 p. 647. *Ex parte Fearon*, and the note (*a*).

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title; which, however, if it retains in it any thing that has validity, ought not to be delivered up. But the course has been to file a bill, stating the reasons they cannot bring an ejectment; mortgages, outstanding terms, &c. and in general cases this Court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal; and afterwards does what is right. The habit in doing this has been merely to direct the heir to bring his ejectment; providing, that the defendants shall not set up at law a term, satisfied or unsatisfied; and those obstacles being removed, and a trial had in that way under the controul of a Court of Law, they come back for the account, the deeds, &c. which course leaves all the incumbrances just as much incumbered, as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing issues; for certainly the question, whether a new trial should or should not be had, is discussed, with much more satisfaction where the trial was had, than in the Court, out of which the issue was directed. In the case, to which I have alluded, the Court should have some averment upon the record and proof, that those obstacles do exist, which may prevent an ejectment; for it cannot be by the admission of infants; and I doubt, whether the shape of this record, and the proofs before the Court, are sufficient to authorise these issues. As it is clear, this question may come on repeatedly at the instance of
* 299 other parties, *it is important to place the cause under such circumstances, that the mode of the trial may be so satisfactory as to be binding in prudence, if not otherwise binding. I cannot permit the cause to be set down upon the equity reserved, and pronounce a final decree without reforming the record upon a rehearing.

The ground, upon which a new trial ought to be granted, if you can go on with effect, is this. I do not think this question has been sufficiently tried. This Court, though it cannot controul the conclusion [illegible] Jury upon a will,

must take care that the cause shall be fully and satisfactorily tried; especially where the question is of great value, and it appears, the Judge was not satisfied upon the conclusion, as drawn from the circumstances of the case then before him, independent of the effect of the former trial.



I do not enter into the consideration of the questions in this case, under what circumstances the destruction of the duplicate of a will is or is not a cancellation of both parts, whether originally both parts were duplicates; whether after the alteration of the contents of the one, that term properly applied to them. I do not give any opinion upon these questions. With reference to the alteration of the legacy, suppose this to be the case of an additional sum; both sums by force of the wills charged upon the land; (as to which a considerable doubt occurs upon the effect of the codicil, connecting itself, but not annexed to the will, whether it would republish the will with the alteration,) a question would arise upon the claim of the legatee under those two instruments, either, and which of them. The other alteration also is material as to the principles, upon which this case is to be decided; *the portion, at the age of 21 or marriage, charged upon real estate. It does not appear, when the alteration was made; but it is perfectly familiar, that Juries are called upon to decide the question, at what time an alteration was made in a will, with scarcely any evidence. Here then is an alteration in 1797; another, whether before 1799 does not appear. It is material to consider whether the conclusion as to the subsequent facts may be formed upon the effect of the acts done in 1799, 1800, and 1803; as the Jury shall think those alterations took place at one period or another, and, in 1799, the testator got possession of the duplicates. * 300

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Much important reasoning has been urged, as pointing to the conclusion of fact, founded upon the *animus cancellandi*, as applied to the circumstance, whether the testator has, or has not, possession of both parts of the will, which may be more or less forcibly applied with reference to the truth of the fact, how one part stood before he got possession of the other. In 1800, a transaction took place, which must be brought distinctly before the Jury, especially as the trial is for the information of this Court; which is to deal both with the estates he had before the will, and with those which are affected by the codicil only; considering also, that as the codicil connects itself with the one or the other of these instruments, whose effects are different, the estates must be to different uses. The testator in 1800, by a codicil, having at least as much authority as any parol conversation he might hold, declared, that he had then a subsisting will. I give no opinion upon the effect of this reasoning; but, suppose the Jury should think, that previously to that codicil he had actually cancelled this paper, the question will be,
* 301 whether the codicil is not evidence, that by *cancelling that paper he did not mean to destroy the other; but intended to put that and the codicil together. If they should think, he had not at the date of the codicil cancelled the other paper, the question then will be, whether he meant the codicil to be applied to the one or the other; if by the effect of the alteration of the one, these papers are different. If the Jury think it was meant to be annexed to the paper with the alterations, will the destruction of that paper apply the codicil to the other, upon any legal application which the codicil may have both by reason of annexation, or the destruction of one?

I give no opinion upon any of these points. But I think these questions were not put to the Jury, so as to bring before them all the points, with a view to the question, whether the cancellation of the one paper effects the other; or, whether the codicil applies to the other, so as

to amount to a republication. As to the evidence of the conversation, I agree it was entirely with the the Jury, if every thing was put to them, to say in what sense the testator meant the expression about destroying the will; farther, that the Jury must take into their consideration, as far as the evidence enables them, the habit and usual conduct of testators as to declarations about their wills. Few declarations deserve less credit than those of men as to what they have done by their wills. The wish to silence importunity, to elude questions from persons, who take upon them to judge of their own claims, must be taken into consideration, with a fair regard to the *prima facie* import, and the possible intention, connected with all the other circumstances.

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With this view of the case, with reference to property of so considerable value, and participating in *the feelings of the learned Judge who tried the cause, I think it would be most mischievous to refuse a reconsideration of it, if the cause can proceed in equity. But I desire to be understood, that I have not intimated the slightest opinion, whether the same conclusion will or will not be right. That conclusion, however, must be the result of a satisfactory trial. Upon the other point the consideration hereafter will be, whether the cause can go on as it stands, or there ought to be a rehearing. * 302

A new trial was accordingly directed; which took place in the Court of King's Bench, before Lord *Ellenborough*; and another verdict was obtained by the devisee. A motion for a fourth trial came on before Lord *Erskine*.

Sir *Vicary Gibbs*, Mr. *Richards*, Mr. *Topping*, Mr. *Dauncey*, and Mr. *Benyon*, supported the motion. 1807. *January* 23.

This application for a new trial is made after three concurring verdicts; but not after decisions of three Juries upon the same point. No evidence was given, that the codicil was executed after the cancellation; which was in-

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cumbent upon the devisee; and the verdict stands only upon the ground that the heir has not disproved that. This verdict, obtained upon a distinct case, adds no strength to the former verdicts. The two parts of the will originally in duplicate, are found in no place of safe custody. The codicil is found in another place; and has therefore no more connection with the one than the other. The utmost effect of the codicil is, that in 1800, when it was executed, it applied to one or both of these papers; but there is no *evidence, that at the death of the testator, in 1804, when it was found, it applied to either, as an effective instrument. The legal effect of the cancellation of one of these duplicates is, that the other is cancelled. Lord *Ellenborough* upon the last trial, as Lord Chief Justice *Mansfield* did upon the former, laid that down clearly; and that it was upon the devisee to repel that. This is not an equivocal act of cancellation; leaving any doubt, any room for implication, that it was involuntary. At that moment the testator intended to take away the property given to this devisee, who must shew, at what moment that devise was re-established. If that moment cannot be pointed out, the heirs are entitled; and, as they are so nearly connected with the testator, an alteration in their favour of his intention is not improbable.

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Whatever might have been the testator's intention as to the uncancelled instrument in 1799, when he sent for it, meaning as he said, to make some addition to it, he never executed that intention. That instrument appears to have remained from that period, without alteration or attention, in the place where it was found, not in any place of safe custody, but in a book-case, of which Mrs. *Carry* had a key, and to which any person might have had access; or suppose, if it can be credited, that whenever a book was taken, the book-case was locked, is that the way a man treats the instrument he means to be his will? This also was not the instrument which he had rectified, according to his intention, which had been mistaken by *Pember-*

*ton.* The testator sees the books lying upon the sofa, and assists in removing them; but this instrument never catches his eye. It never occurs to him, that this valuable paper may be among those books, taken from *the same place. Does this prove a different consideration, a superior care of this part; or an equal disregard of this as of the cancelled paper, as of no value; and is not the reason obvious, that by cancelling the one he had rendered both ineffective? The fair conclusion is, that the instrument, found in the same year, 1803, cancelled, in the same bookcase with the other, was, while uncancelled, and of more validity, as containing the alterations, kept in a place of safe custody; but when cancelled, no more attention was given to that than to the other. The testator's expression to Mrs. *Carey*, when the cancelled instrument was produced, is, "see how rich you would have been, if I had not "destroyed my will;" not, "how much more rich;" denoting comparison, and reference to another instrument. * 304

Under these circumstances the evidence does not sustain the verdict. The uncancelled instrument does not contain the real intention as to Mrs. *Carey*. There is no evidence of a change of intention towards her, from which the object to do away the alterations only might be collected; a weak reason however for the destruction of the whole instrument. The inference is rather an increase of favour to her; a larger sum being talked of. The instruments are found together, in a situation in which no man would keep his will; that which is cancelled not appearing in that state, until it was produced in 1803; the codicil, probably executed about *Christmas*, 1800; which if once it applied to the cancelled instrument, cannot now be applied to that, which is entire; and against the naked facts, which throw the proof upon the devisee, no evidence is produced, that the codicil was executed after the cancellation.

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Pemberton v. Pemberton.

*The *Solicitor-General*,(a) Serjeant *Williams*, Mr. *Wilson*, and Mr. *Hart*, in support of the verdict.

After three concurring verdicts a Court of Equity would grant a perpetual injunction. How many more verdicts are required to put this question at rest? Is it to proceed for the chance of a verdict for the heir? Could such a verdict stand against the three obtained by the devisee? The proposition, that the naked fact of the cancellation of one duplicate, is a cancellation of both, is not conceded. The act of tearing the name from a will is ambiguous. The effect depends upon the intention. If the act was done with the intention of cancelling both papers, it would have that effect. If one is in the possession of another person, the cancellation of that which remains in the possession of the testator, is *primâ facie* evidence of the intention to cancel both; but, if both are in his possession, there is no authority that the cancellation of one is even *prima facie* evidence of that intention. Upon the reason can that be presumed? Why are not both cancelled; why, the object being entirely to destroy the disposition, is one preserved? The argument must be, that he knew, and chose to rely upon, the legal consequence, the virtual cancellation of the other, rather than take the trouble of actually cancelling that also, which would remove all doubt; while upon the other supposition, he must carefully preserve the cancelled instrument, the only evidence of his purpose.

(a) Sir Samuel Romilly.

A testator never executes a will in duplicate with the contemplation of keeping both parts. But the instant an alteration is made in one, they cease to be duplicates, the
* 306 altered instrument is from that time a *distinct, subsequent, will; as if a will of a subsequent date had been executed. The effect of striking out of the legacy, at the age of 21 or marriage, the words "or marriage," is a revocation of that interest, charged upon his real estate; which revocation of a particular devise, according to the

late case of *Larkins* v. *Larkins*,(a) may be by obliteration though an interlineation requires re-execution with witnesses. Then the effect of the revocation of a will, which revoked a former will, is to set up that former will; *Goodright*, on the demise of *Glazier*, v. *Glazier*.(b) That is precisely this case. The proposition, that the alteration of one of these instruments effects the alteration of the other, stands neither upon authority nor reason. If the codicil was executed before the cancellation, it is by no means admitted, that the cancellation of the duplicate of the will was a cancellation of the codicil.

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(a) 2 *Bos. & Pull.* 16.

(b) 4 *Burr.* 2512.

It is objected, that there is no evidence that the codicil was executed subsequent to the cancellation. First, the transaction itself forms an inference for the presumption of a Jury. The testator having in his possession these two instruments, one thus defaced, and intending to republish one of them, the probability is, that he meant to republish that which was unaltered. But the codicil itself furnishes evidence still more decisive, that he could not mean to republish the altered paper; the codicil having an interlineation, reciting, that since he made his will he had purchased some estates, and devising them, his attention, therefore, called to the necessity of noticing the alterations and interlineations in the will. It is clear, that when *doing this, he meant to republish some will, declaring that instrument to be a codicil to his will. This is strong evidence, that he meant to republish the part unaltered, not the other. Next, both these instruments remained in his possession until his death. Admitting, though there was no evidence, that he saw the uncancelled paper when lying upon the sofa, and upon the chest of drawers, can it be credited, that he would not have destroyed it, if repeatedly under his notice; that he would have left the cancellation depending entirely upon the preservation of the cancelled paper? He must be supposed to reason with the same legal accuracy throughout. Those

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who attribute to him such knowledge and providence, must account for the singular preservation of the codicil, and the other instrument entire, imputing to him the purpose to die intestate.

The note to *Pemberton*, in *January*, 1799, subsequent to the alterations, desiring him to bring over the duplicate, which he had, in order that some addition may be made to it, forms material evidence. He did not then consider it cancelled. What he proposed is in the dark. It could not be merely to make the alterations he had made in the other. They would not be "*addition*." The conclusion upon that part of the evidence is, that at that time he did not intend, that the instrument he had altered should be his will; but proposed to make some addition to the other; that he afterwards relinquished that design; and finally resolved to die with that instrument unaltered, as his will. The fair and probable presumption is, that in 1798 he had so altered one part, and written at the bottom of it, that he thought it necessary to do something; that he got the other part into his possession with that view;
* 308 and then cancelled that which was defaced, which he *kept before, as a sort of draft of his will, which then became useless.

The devisee still insists upon the point, which Lord *Eldon*, granting a new trial upon another ground, declined to determine; that it is not upon the devisee to shew, that the act of cancellation was not *animo cancellandi*. The result of the authorities, Sir *Ed. Seymour's* case,(a) *Limbrey* v. *Mason*,(b) and *Burtonshaw* v. *Gilbert*,(c) is, that the heir must go into the circumstances to shew that the act was done with that purpose. Upon a question of this sort, whether there is a will, or not, or as to the sanity of the testator, the devisee and the heir stand upon equal terms; there is no favour to the latter; as perhaps there may be upon a question as to the construction of a will.

(a) Stated in *Onions* v *Tyrer*, 1 P Wms. 344. *Pre Ch.* 459. 2 *Vern.* 743

(b) 8 *Vin. Tit. Dev.* 140 pl 17.

(c) *Cowp* 49.

The Lord CHANCELLOR.

1807. Pemberton v. Pemberton. January 21.

From the account I have had of what passed upon the last trial I collect, that Sir *Vicary Gibbs* is perfectly warranted in his representation of the opinion expressed by Lord *Ellenborough*, upon the proposition, that, as both the instruments were with the testator, the cancellation of the one was not a cancellation of the other. His Lordship expressed a different opinion upon that point; holding, that the cancellation of one part was *prima facie* evidence of the cancellation of both, liable as Lord Chief Justice *Mansfield* also held, to be rebutted by evidence, that there was not *animus cancellandi*, *or by a republication; but that it was upon the devisee to set up the will again; and therefore the time at which the cancellation took place, with reference to the date of the codicil, was the question: the affirmative, that the cancellation was previous to the codicil being upon the devisee; a question of presumption, upon all the circumstances, whether, the codicil and the counterpart of the will being found uncancelled, and the instrument that was altered, being that which is cancelled, the cancellation took place at such a period, that the instrument is set up again by the codicil, and they constitute the will of this testator. * 309

The evidence of *Leighton* states, that though the testator frequently contradicted himself in conversation, merely, as it is represented, the effect of habit, his declarations in favour of this boy were uniform. He made his will; acting upon a purpose corresponding with those declarations, uniform, contrary to his usual habit, and so rooted in his mind as not to be shaken by the versatility of his temper. He had scarcely made the will, when he was dissatisfied; and, if I found any evidence, that his dissatisfaction touched the devise, that it was a general dissatisfaction; if he had expressed a wish to die intestate,

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and declared, that he repented of all he had done, such evidence would have had considerable weight against the devise. But his mind is to be viewed, not through his declarations only, which are of no value, compared with his acts. On the very day of execution he makes the alteration as to Mrs. *Carey*'s legacy; expressing, not that he had changed his mind, even as to that legacy, but, that this direction was not understood. At that time the counterpart was carried by Mr. *Pemberton* to *Shrewsbury*. Here, *then, is no indication of a change of purpose as to the principal devise.

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Mrs. *Carey*, by her evidence, states, that she did not see the will for a year afterwards, which brings it to 1798. She saw it then; she saw him make some erasures and scratches in it. The instrument being produced, no erasures appear over the principal devise. At that time there was no cancelled will. His mind appears unsettled as to the objects of those alterations; but no changes as to his principal object. This carries it on to the important period, 1799; when he wrote to Mr. *Pemberton* to bring over the counterpart, assigning this reason: "as I wish to make some addition to it, which I will do, when I go to town." He must have considered the will as being then in existence, but as a will, that did not speak his mind as to the legacy to Mrs. *Carey* and other subjects.

Presumption that the cancellation of one duplicate of a will cancels the other, though both are in the testator's possession, and the cancelled instrument had been altered. In the two latter cases the presumption weaker.

If at this period he was not only dissatisfied with his alterations, but farther wished to have no will, and meant to die intestate, his course was easy. First, he might have cancelled the part in his own possession; which act would also have destroyed that which Mr. *Pemberton* had; for, if a testator cancels that part which is with him, the legal presumption is that the duplicate, in the possession of another, is not to prevail. My opinion goes farther; that if the testator himself has possession of both, the presumption holds, though weaker; and, farther, that even if, having both in his possession, he alters one, and then

destroys that which he had altered, there is also the presumption; but still weaker. But all these cases according to *Burtonshaw* *v. *Gilbert*(a) are matter of evidence. Another mode, if he intended to die intestate, was to destroy the counterpart. The conclusion therefore upon this part of the case is, that up to that time, when he sent for the counterpart, he did not intend to die intestate, and there was no change of purpose as to this devise. * 311

(a) Cowp. 49

Mrs. *Carey* states, that this instrument was put in the book-case. At that time it was locked up. The instrument that was altered, she saw no more of till *September*, 1803. When that was produced, and he pointed out to her the alteration he had made in her favour, with that expression, "see how rich you would have been, if I had not destroyed my will," two other persons were in the room. There is nothing, shewing that the act of cancellation was done at that time. He does not go for the purpose of shewing it to her as something done, which it was necessary immediately to communicate, but he shews it to her merely as coming across him, cancelled, and he then proposes to throw it into the fire.

Let us pause here, to consider what would have been the consequence as to the unaltered part, which he had in his memory so far as to have sent for it. Must I not presume that he knew that it was in his possession; and a codicil made and solemnly executed, deposited in a drawer, and preserved with care? Must I not presume, that he knew he had both those instruments; that, if he destroyed that which was cancelled, and Mrs. *Carey* had died the next day, and there was no proof of previous cancellation, that instrument in the house, dated in 1797, and the codicil, attaching to that and *nothing else, or without the codicil, if that had been lost, would have been his will? * 312

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Mrs. *Carey* then saves the cancelled instrument from the fire, by desiring to have it for thread-papers. That was her act, not his. If the testator considered this instrument as no longer in existence as his will, and that by the cancellation of one he had cancelled the other, and by the cancellation had also destroyed the codicil, is there any reason to conclude that he would not have actually destroyed those instruments? The observation, that he took so little care of the instrument that remained, is fair. It was in the book-case, to which there were two keys, one in his care, the other in Mrs. *Carey's*. It was taken out and put upon the couch; and this is not a house in town, where the room would be open to many people, but a country-house. There is no evidence that he saw it upon the couch; and, when company was coming, the books and all were put into the closet; and afterwards, by the act of Mrs. *Carey*, who says she knew nothing of the codicil, it was put back again, and was kept very carelessly, which forms the strength of the case of the defendant.

But we must consider which is the most probable conclusion. Could the testator, using this ambiguous expression to Mrs. *Carey*, under his protection, for whom he expressed such anxiety, contemplate, that on the event of his death the next day she would have nothing? The fair and reasonable presumption upon the evidence is, that he had either resolved to cancel, or had in fact cancelled, at the time he was no longer satisfied that the counterpart should remain with *Pemberton*; and that when he brought it back to his own possession, if his purpose was to die
* 313 intestate, he would have cancelled *both instruments. Upon this application I must look to the former verdicts; all drawing the same result, that he did not intend to die intestate, and upon evidence which might have been received upon the first trial. After all this evidence the loose declarations of the testator, under circumstances imposing upon him no obligation of veracity, are nothing.

This case, therefore, must now be at rest. My conclusion upon the evidence concurs with that which is returned to me. Am I then, satisfied with this verdict, to send the case to a fourth trial, for the chance of a verdict, with which I must be dissatisfied, and should be obliged to direct a fifth trial?

1807. Pemberton v. Pemberton.



## EX PARTE BULMER.
## EX PARTE ELLIS.

*January* 14. 29.

THESE petitions were presented under the following circumstances:

Promissory notes given by a stock-broker for the balance of an account of money advanced to him to be employed in stock jobbing transactions, contrary to the statute 7 *Geo* II. c 8. Part of the considera-tion, consisting of the profits upon those transactions, proof under his bankruptcy was restrained to the residue, viz. the money received, which he had applied to his own use.

*Thomas Pratt*, a stock-broker, previously to his bankruptcy, had received large sums of money from the petitioner, *John Peter Bulmer*, to be employed in stock transactions, illegal within the stock jobbing act.(a) The bankrupt kept a debtor and creditor account with *Bulmer*, charging himself with the money advanced, and bringing the profits and losses, *as they occurred, to the credit or debit of *Bulmer*; but it appeared also, that the bankrupt, while he had a large sum of money in his hands belonging to *Bulmer*, to be so applied, diverted it wholly to his own use, without employing it at all in those transactions; and becoming insolvent, and the balance being against him to the amount of 12,242*l.* 10*s.* he gave to *Bulmer* twelve promissory notes, which *Bulmer* attempted to prove under the commission; but the whole proof was rejected by the commissioners, on the ground that the consideration of the notes was illegal. By an order pronounced in *April*, 1805, upon the petition of *Bulmer*, the commissioners were directed to admit the petitioner to prove such sum

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(a) Stat. 7 *Geo.* II. c 8

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Ex parte Bulmer.

as he should be able to substantiate ; and if they should not admit him to prove the whole, or any part of it, they were to state the grounds of the rejection, and any thing special relative thereto.

The commissioners by their report under that order, stated, that the bankrupt had made an affidavit, concerning the transaction, and had been examined by them *viva voce;* but that *Bulmer*, though summoned, had not attended ; and that it appeared to them, by the examination of the bankrupt, that the debt alleged to be due to *Bulmer*, chiefly arose out of, or was mixed with, dealings and transactions which they conceived to be a violation of the act of the 7 *Geo.* II. against stock jobbing.

The other petition was presented by the assignees, stating these facts, and praying that the order made in *April*, 1805, may be discharged, and that *Bulmer's* claim to prove may be finally rejected.

On the petition coming on to be heard, it appeared by
* 315 the bankrupt's examination, that the bankrupt had *received the money for the purposes abovementioned, and had kept the account of profits and losses ; but that, having applied the money to his own private use, instead of applying it in the purchase of stock, he had given twelve promissory notes, making together 12,242*l.* 10*s.* for the balance ; but that such balance was in part made up of different balances of gains, brought to the credit of *Bulmer*, viz. 15*l.* 12*s.* 22*l.* 10*s.* 110*l.* 11*s.* 75*l.* and 26*l.* 5*s.* making in all 255*l.* 18*s.* which was the mixture alluded to by the commissioners, and which, entering into the consideration of the promissory notes, was the ground of rejecting the whole claim,

The *Solicitor-General*, and Mr. *W. Ager*, in support of the petition by *Bulmer*, contended, that the debt claimed by him could not be affected by the act of Parliament.

The Lord CHANCELLOR.

1807.

Ex parte Bulmer.

January 29.

The question is, whether a balance could have been recovered at law upon these twelve promissory notes; or, if not upon the notes, as in part tainted with the illegal gain, arising from stock jobbing, whether the petitioner, *Bulmer*, could nevertheless have recovered against *Pratt*, if he had continued solvent, as for money had and received to the use of *Bulmer*, all the funds in the hands of *Pratt*, which he had not employed in stock jobbing, but which he had diverted to his own private use; and there can be no doubt that be might.

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Principle upon actions, arising out of illegal transactions; if *malum prohibitum* only, the plaintiff may recover, unless it be directly upon the contract precluded.

Some confusion has arisen upon this subject in our books from stating too generally the principle, upon *which Courts refuse their assistance to persons who have been engaged in illegal contracts, although, as between the parties litigant, private justice is on the side of the plaintiff. It is said, that if a plaintiff cannot open his case without shewing that he has broken the law, the Court will not assist him, whatever his claim in justice may be upon the defendant. But this proposition is much too large and general, and is not at all supported by the authorities. The case may be so connected with illegal transactions, that it may be impossible to disconnect it from them; but if the illegality be *malum prohibitum* only, the plaintiff may recover, unless it be directly upon the contract precluded. This is clearly established by the case of *Faikney* v. *Reynous*,(*a*) the principle of which, though doubted by a high authority, has stood its ground whenever it has been questioned, and must be taken to be the law.

(*a*) 4 *Burr.* 2069.

It was an action of debt by *Faikney*, on a bond; and the defendant, after praying oyer of the condition, pleaded the act of the 7 of *Geo.* II. against stock jobbing, and averred, that the plaintiff and one *Richardson*, were jointly concerned in stock jobbing, and that the plaintiff, contrary to the statute, voluntarily gave to several persons

1807. Ex parte Palmer.

large sums of money amounting to 3,000*l.* for compounding and making up differences for the not delivering stock, &c. (*following the words of the act*,) and that the bond was given to secure the repayment from *Richardson* of 1,500*l.* (being the moiety of the 3,000*l.*) which the plaintiff had paid on the joint account.

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The plea was demurred to; but the Court held, that although the persons to whom *Faikney* had paid *the money for *Richardson* and himself, could not have enforced such payment against them, or either of them, the contract being directly against the act, and although if *Faikney* had paid what was due by both, the law might perhaps not have raised an *assumpsit* by *Richardson* to pay his moiety, if *Faikney* had paid it without his consent, yet *Richardson*(a) having given a bond to secure it, that circumstance was conclusive evidence that he had agreed to such voluntary payment; and, therefore, though the obligation arose from an originally illegal transaction, the bond was a valid obligation.

(a) In 3 *Term Rep.* 419 note to *Petrie* v *Hannay*, it appears, that *Richardson* was the other defendant as co-obligor.

The law of this case was clearly recognised and confirmed by the case of *Petrie and another, executors of Keeble*, v. *Hannay*.(b) There *Keeble*, the testator, and *Hannay* and one *Sadlier*, having been engaged in stock jobbing, and having come to a settlement with *Portis*, their broker, who had paid all the differences, *Keeble* repaid him the whole, except 811*l.* part of *Hannay's* proportion, for which *Keeble* drew a bill in favour of *Portis*, which *Hannay* accepted; the bill not being paid when due, by *Hannay*, *Portis* sued the plaintiffs, executors of *Keeble*, and recovered the money, no defence having been made; and the case reported was an action for their reimbursement, as for money laid out and expended; and it was held by the court, Lord *Kenyon* only dissenting, that the action was maintainable. The noble and learned lord, whose memory I cherish with affection, and who, in my opinion, was one of the greatest lawyers who ever flourished in

(b) 3 *Term Rep.* 418.

1807. Ex parte Bulmer.

*England*, did not venture to deny the law of *Faikney* v. *Reynous*; but said that it did not apply, as the Court *was in that case stopped from entering into the illegal consideration, the action being on a bond; but it appears, not only from the judgments delivered by the other Judges, but by the case of *Faikney* v. *Reynous* itself, that that was not so; for the stock jobbing act(*a*) was pleaded, and no law is better established, than that deeds may be impeached by matter *dehors*,(*b*) as upon averments of illegal and corrupt considerations, which happens every day in cases of usury: in this case therefore of *Petrie* v. *Hannay*(c) the court could not but see that there had been illegal transactions, which gave rise to the demand; but the money demanded not being directly upon the illegal contract, an acceptance being given for the debt, and being due in good faith and justice, it was recoverable at law. * 318

A deed may be impeached by matter *dehors*; as upon averment of illegal and corrupt consideration.

Rep. 418.

This very distinction was taken in the case of *Steers* v. *Lashley*,(*d*) but how properly in the instance may be doubted. In that case the action was on a bill of exchange, drawn by one *Wilson* on the defendant, and accepted by him, and after acceptance indorsed by *Wilson* to the plaintiff. It appeared that the defendant had been engaged in stock jobbing transactions with different persons, in which transactions *Wilson* was employed as his broker, and had paid the differences for him. Some dispute arising as to the amount so paid by the defendant, and the matter being referred to arbitration, the sum of 306*l*. 12*s*. 6*d*. was found to be due to *Wilson* from the defendant; on the footing of which debt found due by the award, *Wilson* drew the bill in question, which was accepted by the defendant, and indorsed to the plaintiff. Here, as far as illegality of *consideration applied, the plaintiff could only be in the place of *Wilson*, the drawer, and the plaintiff was therefore nonsuited by Lord *Kenyon* at the the trial, on the ground that the consideration of the note was directly for a sum, * 319

(*d*) 6 *Term Rep.* 61.

(*a*) Stat. 7 *Geo.* II. c. 8. (*b*) *Collins* v. *Blantern*, 2 *Wils.* 341.

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the payment of which could not be enforced, though found due under an award.

On a motion for a new trial, Lord *Kenyon* said, and another Judge appears to have concurred with him, that if the plaintiff had lent the money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, it would have been within the principle of *Faikney* v. *Reynous*;(a) but that in the case before them it was an action for the very difference.

(a) 4 Burr. 2096.

This case shews that *Faikney* v. *Reynous* and *Petrie* v. *Hannay*(b) were recognised as law, and with great submission to Lord *Kenyon*, the case is absolutely the same with *Faikney* v. *Reynous*, because the reference of the amount, and the acceptance of the defendant after the award, was the same evidence as the bond was in *Faikney* v. *Reynous*, that *Wilson* had paid the defendant's differences by his direction, and if so, the cases cannot be distinguished. I thought so when I moved, as counsel, to set aside the nonsuit; and I think so still. If *Wilson*, by the defendant's consent, had not paid his differences, they could not have been recovered by those to whom they were paid: but having been by his desire, the person paying them was entitled to be reimbursed. The history of this case is plainly, that Lord *Kenyon* kept up his objection to the case of *Faikney* v. *Reynous*, and it appears by the reporter's note, that Mr. Justice *Grose* and Mr. Justice *Lawrence* were at the *Old Bailey*; probably it passed on a sudden.

(b) 3 Term Rep. 418

* 320 *The true distinction occurs again in *Booth* v. *Hodgson*,(a) in which judgment I entirely concur, and the Judges who were absent on the other occasion, were present in that instance. There the *Browns*, who became bankrupts, had been partners with one *Hodgson*, who was an insurance broker, in the insurance of ships, a partnership illegal b

(a) 6 Term Rep. 405.

statute.(b) The name of *Brown* only was used in the policies, but all the *premiums* from the commencement of the partnership, till *Brown* became bankrupt, were received by the defendant, which amounted to upwards of 20,000*l.* for which the action was brought by the assignees of the *Browns*. There it was justly held that the plaintiff could not recover, there was, as Mr. Justice *Grose* observed, no express *assumpsit*, and the law would not imply one, the action being by one partner in an illegal partnership to recover the part of the illegal traffic from the other partner. But in that case the whole Court expressly recognised *Faikney* v. *Reynous*(c) and *Petrie* v. *Hannay*(d) to be law.

(b) Stat. 6 *Geo.* I. c. 18. s. 12. See *Knowles* v. *Haughton*, *ante*, vol. 11. p. 168.

(c) 4 *Burr.* 2069.

(d) 3 *Term Rep.* 418.

The application of these principles and cases to the case now before us is obvious. I shall not permit *Bulmer* to prove the promissory notes as binding obligations, as the consideration for them is made up, though a very small part of the fruit of the illegal use of the money lodged with the bankrupt, but I shall allow him to prove all that is admitted by the bankrupt to have been the money put into his hands, and diverted to his own use, as, if he had continued solvent, he must have been responsible to *Bulmer* for that misapplication.

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## AYNSWORTH *against* PRATCHETT.

*February* 24.

Increase of maintenance, beyond that prescribed by the will, ordered under circumstances, the infants being entitled to the fund absolutely among them, viz. a daughter to a portion at 21, and the sons to the residue with survivorship.

THOMAS AYNSWORTH, by his will, devised and bequeathed his real and personal estate to trustees, upon trust, to pay to his wife for her life such annual sum as would, with the rents and profits of his estate, settled upon her, make up 100*l.* *per annum*, and to permit her to receive the rents of a house, with the use of the furniture and other articles, also for her life; and upon farther trust, by sale or mortgage to raise and pay to his wife for the maintenance and education of all the children he might

1807. Aynsworth v. Pratchett

have by her, living at his death, or born in due time afterwards, 30*l.* *per annum* each, as long as they should choose to remain under her care.

The testator also directed his trustees to pay to all his daughters, living at his death, or born in due time afterwards, when and as they should respectively attain 21, 1,000*l.* each, and to raise such sums as should be sufficient to place his sons out apprentices, or to a profession, and, as to the residue of his real and personal estate, to convey and assign among his sons *John*, *William*, *Thomas*, and such other sons as he might have by his said wife, living at his death, or born in due time afterwards, equally, as tenants in common, and their heirs, executors, &c. with survivorship.

The bill was filed on behalf of *John*, *Thomas*, and *Elizabeth*, the surviving children of the testator, *William* being dead. The object of the bill was to obtain an increase of maintenance; and a petition was accordingly presented on the part of the plaintiffs, stating, that the
* 322 plaintiff, *John Aynsworth*, was of the age of 18, **Thomas* 13, and *Elizabeth* 11; that the rents and profits of the real and personal estate, after satisfaction of the debts and all charges, greatly exceed the allowance of 30*l.* each for maintenance, given by the will; that the petitioners all live with their mother, and have not any other fortune than they are entitled to under the will; that the allowance of 30*l.* each is greatly insufficient for their maintenance and education; particularly as the eldest son is in a bad state of health, so as to require medical advice, and journies to the sea; and that their mother's income is only the sum of 100*l.* *per annum* under the will.

The prayer of the petition was, that the petitioners may be declared under the circumstances, entitled to farther maintenance according to the prayer of the bill, as well

for the time past, since the death of the father, as to come; and a reference to the Master for that purpose.

This petition had been in the consent paper; but the Master of the Rolls having some doubt, it was set down in the general paper.

Mr. *Horne*, in support of the petition, in addition to other authorities,(a) which he had cited, referred to a case in the family of the Duke of *Leeds*.

(a) See *Errington* v. *Chapman*, *ante*, vol 12 p. 20 and the references.

The trustees did not oppose the petition.

The MASTER of the ROLLS said, upon the authorities the order might be made; and a reference was directed accordingly.



## *NELTHORPE *against* LAW.

* 323

*February* 5.

Injunction of course for want of answer to an amended bill; an answer having been put in to the original bill; and no injunction obtained upon that.

Injunction stays execution only; not, as in the Court of Exchequer, trial also; but may afterwards be extended to stay trial upon a slight affidavit.

THE original bill in this cause prayed an injunction against proceeding at law upon promissory notes. An injunction had not been obtained when the answer came in; after which the bill was amended, and the plaintiff obtained an injunction of course, for want of an answer to the amended bill. The defendant moved to discharge that order; and the plaintiff moved, that the injunction should be extended to stay trial, upon the usual affidavit. The defendant's motion was abandoned upon the suggestion, that the answer was upon the file, but the Six Clerks' certificate was not produced.

Mr. *W. Agar*, for the plaintiff, in support of the other motion, cited 3 *Barnardiston*, 322. as an authority, that an injunction not having been obtained upon the original bill, an injunction of course may be had for want of an

1807. Mallthorpe v. Law.

answer to the amended bill; contending farther, that the injunction should be extended to stay trial.

Mr. *Thomson*, for the defendant.

Where one case has been made by the original bill, and upon the answer coming in, a new case is made by filing an amended bill, if the plaintiff may have the common injunction for want of an answer, he cannot upon an affidavit such as this, extend it to stay trial. A special ground should be laid, and verified, which is required by the Court of Exchequer. This affidavit is only a general allegation, that the plaintiff is advised and believes, that important discovery may be obtained from the defendant's
324 answer; which, if a true answer *shall be put in, will enable the plaintiff to defend himself at law. But the answer being now put in, what more would the plaintiff have?

The Register(*a*) referred the Lord Chancellor to the case of *Farrar* v. *Lewis*,(*b*) as establishing the practice of the Court of Chancery to extend the injunction to stay trial upon a very slight affidavit.

(*a*) Mr. *Croft*.

(*b*) 2 *Dick.* 729.

The Lord CHANCELLOR.

The case, cited from *Barnardiston*, is a precise authority for the plaintiff's first point; that no injunction having been obtained upon the original bill, and the answer being put in, the plaintiff may upon an amended bill have the common injunction for want of an answer. The difficulty is as to the application to extend it to stay trial upon a very slight affidavit. That has been permitted, I take it, with a view to obviate the effect of the practice of this Court; which differs from that of the Court of

Exchequer, where the injunction goes at once to stay trial, here staying execution only in the first instance.(c)

1807.

Neithorpe v. Law.

Therefore, as the defendant has not the regular evidence, the Six Clerks' certificate, that the answer is put in, the plaintiff must upon the affidavit, according to the practice of this Court, have the injunction extended to stay trial.

(c) See Pearson v Garlick, ante, vol. 10. p 540.

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February 7.

## *EX PARTE THWAITES.

A commission of bankruptcy, that has been acted upon, cannot be altered

Therefore, the commission being opened, and the commissioners having qualified but the proof of the act of bankruptcy failing, in order to prove an act of bankruptcy subsequent to the date of the commission the commission was superseded; and a new commission issued.

UPON the opening of a commission of bankruptcy, after the commissioners had qualified, an objection appeared to the proof of the act of bankruptcy: the evidence offered, being in fact that of the person, against whom the commission was awarded. Under these circumstances a petition was presented, stating, that the petitioner is now prepared with evidence of an act of bankruptcy, but an act subsequent to the date of the commission, praying therefore, that the *teste* of the commission may be altered, or, that the commission may be superseded, and that a new commission may issue.

Mr. *Cooke*, in support of the petition, suggested, as to the first object of the prayer, that Lord *Eldon* had a difficulty in doing this, with reference to the revenue laws.(a)

The Lord CHANCELLOR agreed, that it would be improper, after the commission had been acted upon, and therefore ordered, that the commission should be superseded, and that a new commission should issue.

(a) *Fisher's* case, *Burrow's* case, *ante*, vol 10. p. 190. 286.

1807.

## WOOD *against* PENOYRE.

Rolls.
1806
December 17.
1807
February 3
5 9

Legacies, to be paid out of the money due on mortgage, "when recovered" The right to interest (at 4 *per cent* the mortgagee producing 5,) does not depend upon the time when the money is recovered

THOMAS TOLSON by his will, dated the 9th of *May*, 1788, after payment of his debts gave to the defendants **Penoyre* and *Wood* the sum of 6,000*l.* secured to him with interest at 5*l. per cent.* upon a mortgage of the estate of Sir *Lucius O'Brien*, in the county of *Clare*, in *Ireland*, and all his legal and equitable interest in the said mortgage, upon trust, to carry on the suits depending in *Ireland* for recovering the said money, in case it should not have been paid in the testator's life, and pay and apply the said money, when recovered, in the manner herein after mentioned. The testator afterwards gave the following, among several other legacies:

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"Also I give to my said trustees, the sum of 2,500*l.* to "be paid within six months next after my decease, and also the farther sum of 2,500*l.* to be paid out of the money "due on the *Irish* mortgage when the same shall be re-"covered," upon trust, to place out the said two sums upon government or other good securities, and pay the interest or dividends to the testator's niece, *Elizabeth Holland*, for life, for her separate use, and after her decease to divide the trust-money among her younger children equally.

"Also I give and bequeath the several legacies to the "several persons herein after mentioned, that is to say, "to my niece, *Elizabeth Wood*, the sum of 100*l.* and to "each of her four children 100*l.* to be paid as soon as may "be after my decease, and also to each of her said chil-"dren the farther sum of 900*l.* to be paid out of the mo-"ney due on the *Irish* mortgage when the same shall be "recovered."

A great number of legacies followed; and then this clause:

*" And I direct that the legacies herein before given " to my servants, and all other legacies not exceeding " 100*l.* each, shall be paid immediately after my decease, " and the other legacies, with those given to charitable uses, within six months next after my decease."

The testator gave the residue of his estate to his nephew, *Joseph Lawrance Duvall*, and appointed his trustees to be two of his executors.

At the time of the testator's death, which happened soon after the execution of his will, and at the death of his niece, *Elizabeth Holland*, in 1791, the money due on the mortgage was still outstanding. It was afterwards received with a considerable arrear of interest by the surviving executors. The bill filed by the surviving children of the testator's nieces, *Wood* and *Holland*, and the personal representatives of those who were dead prayed a declaration, that the plaintiffs are respectively entitled to interest on the several legacies of 900*l.* each; and also on the legacy of 2,500*l.* by the will directed to be paid out of the money due on the mortgage, at the rate of 5*l. per cent.* from the death of the testator: or, if not from that time, then from the end of six months after his death.

Mr. *Alexander* and Mr. *Daniel*, for the plaintiffs.

The question arises upon the words, " when recovered;" first, whether the date of the recovery ought to be the period, from which the interest is to be computed; if not, then what is the period. The construction, attempted upon these words, makes the interest depend upon accident, and the diligence of *the trustees. The effect of * 328
an express and absolute declaration, that the interest of the legatees shall depend upon such circumstances, is not

1807. Wood v. Penoyre.

disputed: but, a different construction is made where it is possible, in order that the right may not depend upon accidents, that attend getting in the property, the obstinacy of the debtor, and the diligence of the trustees. The rule, taking the time of payment as determining the period, from which the interest is to commence, is not an absolute, imperative rule; but subservient to the intention: for instance, in the case of children, the time of payment is not taken as affording the rule as to interest. In the case of a legacy out of a debt there is necessarily inherent in the nature of the thing a postponed time of payment; and yet that does not afford the measure of time, from which interest is to be calculated. The cases establish this proposition, that though an express and unequivocal direction shall have this effect, the Court will not, without that, permit the rights of parties to depend on such circumstances. It comes very near controuling the intention. *Hutcheon* v. *Mannington*,(a) was much considered in *Lewin* v. *Lewin*,(b) *Sitwell* v. *Bernard*,(c) and *Entwistle* v. *Markland*, and *Stuart* v. *Bruere*, in the notes to that case. In *Lewin* v. *Lewin* the Court lays down the rule, and conceives the principle to be, as I now state it. Upon the whole of this will it is not merely ambiguous, but it appears, that the testator had not in view to postpone the payment of the computation of interest by the effect of the words "to be paid when recovered." The intention, that the interest shall not commence until the particular period, is an inference from the particular circumstances, not the effect of a rule applicable to every case. This

* 329 *will has not the explicit expression of intention, that was contained in *Entwistle* v. *Markland;* but this is a question of construction, and if those words were not introduced for the purpose of postponing the payment of interest, the Court will not give them that effect; but will consider it as in the case of a legacy payable out of a debt; which legacy carries interest.

(a) *Ante*, vol. 1. p. 366. 4 *Bro. C. C.* 491, n.
(b) *Ante*, vol. 8, p. 547.
(c) *Ante*, vol. 6. p. 520.

1807.

Wood v. Penoyre.

The only other case, *Gaskell* v. *Harman*,(a) follows the same principle. Your honour, as in *Elwin* v. *Elwin*, thought an express direction appeared; and therefore the Court was bound to execute the intention so directly expressed. A very elaborate and able judgment was pronounced by Lord *Eldon* upon that case, who considered such a construction so inconvenient, that the Court should struggle against it.

(a) *Ante*, vol. 6 p. 159 vol. 11. p. 489.

The Master of the Rolls.

The only question that was argued here in that case, was, whether the vesting took place at the testator's death, or at a subsequent period; and I determined, that the interest did not vest at his death. Then upon the appeal the argument took quite a different course. I never had occasion to consider, what was ascertained. The decree, as drawn up, goes farther than the decision of the case, as it was put before me; the decree considering nothing ascertained but money in the executors' hands. That was not the way it was put to me. I had to consider only the question as to the vesting at the death. If it had been put to me, what was to be considered ascertained, I should certainly have held many things ascertained besides money in the executors' hands. At first I supposed, Lord *Eldon* meant to hold the interest vested at the death; and the argument *points to that, but I do not take Lord *Eldon* to have determined that. * 330

For the plaintiff.

2dly. From what period the interest ought to be carried. The meaning by this phrase was to accelerate the payment; that it should be payable as soon as recovered, and not later. The interest must be computed from the death of the testator, and it must be the interest the debt bears; viz. 5 *per cent.* *Stanley* v. *Potter*, cited in *Chaworth* v.

1807. Wood v. Penoyre.

*Beech*;(a) as to the heritable bond being a specific legacy. But if this is not specific, but a general legacy, it is vested, and there was no intention to postpone the vesting, or any right that should accrue. It is very difficult to distinguish *Hutcheon* v. *Mannington* from this case.

(a) Ante, vol. 4, p. 555. See page 559.

Mr. *Spranger*, for legatees, charged upon the mortgage fund.

These legatees insist upon their right to interest either from the end of the year, or upon the particular clause from the end of six months after the testator's decease. The principle from *Hutcheon* v. *Mannington* and all the other cases is, that to avoid the difficulty and inconvenience to persons, taking partial, limited interests under a will, the obvious consequence being to deprive them of any benefit, and to make their interest depend upon the diligence of the trustees, or the obstinacy of parties, &c. the rule shall be, that, unless the words are so clear, precise, and definite, that they are incapable of any construction but one, the Court will struggle with the words, and give them an interpretation, which, upon the first reading they hardly seem to bear. Cannot the words
* 331 "when the same *shall be recovered," mean any thing but to postpone the time of payment; that single and hard construction, which, however absurd, if clearly expressed, the party certainly has a right, as in *Elwin* v. *Elwin*, to call upon the Court to carry into effect? In this instance they mean nothing more than what without those words would, by operation of law, be considered as expressed, that the legacy was not to be paid, unless the money was recovered; and if the fund should fail, the legacy must fail also. First, this is the most obvious meaning. But if the words are by possibility capable of that construction, the Court will follow that course, that will prevent the hardship and inconvenience of a construction, that would make the interest of the legatee depend upon the diligence of the trustee, or the obstinacy of the mortgagor. That con-

struction would produce peculiar hardship in this case; some of these legacies being given to married women for their sole and separate use; others to infants. Are their interests to depend upon the negligence and inattention of the trustees, or the obstinacy of the mortgagor in not paying the money? Clearly the legatees must have interest from some period subsequent to the testator's death. The construction the Court is desired to make will not carry into effect the general purpose. In the beginning of the will the testator directs the trustees to carry on the suits for recovering the money, if not paid in his life. He therefore thought the debt would be paid in his own life. It is impossible to reconcile these clauses with the most remote idea, that this debt should not be recovered in his life. Lord *Eldon* said, he would struggle for any construction rather than one, which would disappoint the intention wholly as to the beneficial enjoyment.

*Mr. *Richards*, and Mr. *Hart*, for the defendant, the residuary legatee. * 332

By such phrases as "convenient time," &c. the Court supposes the testator to mean what the Court has said is a convenient time, establishing a general rule, as a matter of general convenience, if the intention is not contradicted by it. All the cases that have been cited, are perfectly consistent with this; that where a time of payment is not expressed, but there is only a general reference to convenience, &c. as the testator has not prescribed any particular rule, the Court follows the general rule, upon the same principle of convenience, that limits to the next of kin a legacy to the most deserving of the testator's relations;(a) though not necessarily pointed to. This disposition clearly is not specific, but is merely a pecuniary legacy given out of a particular fund, 6,000*l.* due upon the *Irish* mortgage. The only rule is the intention. The Court cannot struggle to give the interest, and there is no hardship in refusing it, if the testator did not intend that the legatee should have it; and in this will the intention is clear

(a) *Brown* v. *Higgs*, *ante*, vol. 4 p. 708. vol. 5. p. 495. vol. 8. p. 561.

1807.

Wood v. Fenoyre

against it. This particular fund is described as being then in a course of litigation. The whole fund is given to the trustees, with a direction to prosecute the suits; and these legacies are directed to be paid, when the money shall be recovered; when the trustees shall have the fund in their power, and be enabled to deliver it. By giving interest the Court must strike out what is expressed, and substitute conjecture. The objection, that the interest of the legatee will depend upon the obstinacy of the debtor, or
* 333 the diligence of the trustee, applies only to *the prudence of providing such a fund, when a particular time of payment is intended. The testator is the proper judge of that; and the legatee, if paid at the time intended, has no ground of complaint. The power of a testator to prescribe such a time of payment is established by the case of *Gaskell* v. *Harman*.(a) In *Sitwell* v. *Bernard*,(b) the words were very large, "with all convenient speed," without any limitation. It was necessary there, as no time was fixed, to have some rule.

(a) *Ante*, vol. 6 p. 159 vol. 11 p 489

(b) *Ante*, vol. 6 p. 520.

The MASTER of the ROLLS.

*February* 9.

My first impression upon this case certainly was, that the words "when the same shall be recovered," had the effect of postponing the time of payment, and consequently the right to interest until the mortgage debt, out of which the legatees were payable, should have been actually received and got in. But upon farther consideration of the cases applicable to this subject, I am satisfied these words mean, and therefore ought to receive, a different construction.

Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon such securities

is actually got in; but by a rule that has been adopted for the sake of general convenience, this Court holds the personal estate to be reduced *into possession within a year after the death of the testator. Upon that ground, interest is payable upon legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be impracticable within that time: yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment. In the cases of *Entwistle* v. *Markland* and *Sitwell* v. *Bernard*,(a) it was determined that the reference by the testator at the time at which his personal estate should be got in, does not without the most plain and distinct indication of his intention, affect the legal presumption that the personal estate may be got in within a year from the testator's death. In both those cases, all that the plaintiff was entitled to, according to the strict letter of the will, was to have an estate for life in such lands as should be purchased with the produce of the personal estate, when it should be received and got in. It was admitted on all sides in both those cases, that there were large portions of the personal estate that could not by any diligence of the executors, have been possibly reduced into possession within a year from the death of the testator; and yet it was held, that the whole, for the purpose of the question then before the Court, was to be considered as having been reduced into possession at the end of the year from the testator's death, so as to entitle the tenant for life to interest upon the whole fund, as if it had been actually realized, and actually capable of being laid out in land.

1807. Wood v. Penoyre.

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General rule, for convenience, considering the personal estate to be reduced into possession a year from the death of the testator; and therefore interest upon legacies from that period, unless some other is fixed by the will, though actual payment within that time may, in many instances, be impracticable.

(a) *Ante*, v. 6. p. 520.

Reference by the will to the time when the personal estate shall be got in does not, without the most plain, distinct intention, affect the legal presumption, that it may be got in within a year.

These cases shew that the actual delay of payment is not necessary, in order to found the claim of interest. If the executors in either of those cases had been *called upon by the tenant for life to purchase an estate, in order that he might enter into the enjoyment and the receipt of the rents and profits, they would have had just the same answer to give, which the executors and trustees in this

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1807. Wood v. Benoyre.

case say they would have given, if they had been called upon to pay before the money due upon the mortgage was received; for they would have said in those cases respectively, it was impossible for them to purchase land, for they could not with due diligence have got in the personal estate, with which that land was to be purchased. So the executors in this case say, the legatees could not have had their legacies, if a bill had been filed, as the mortgage, out of which they were payable, was not received. But it was held, that the possibility of purchasing in fact does not determine the question whether, according to the legal presumption the purchase might not have been made. So, the possibility in this case does not determine, whether by legal presumption the mortgage might not have been called in within a year. I cannot without rejecting the authority of those cases hold that the mortgage, though not actually capable of being called in, is not to be considered as having been got in within the year. Constructive receipt is held equivalent to actual receipt for the purpose of the right to interest. There is no doubt, a testator may exclude the rule of the Court, by plainly indicating an intention inconsistent with it; and in *Gaskell* v. *Harman*,(a) and *Elwin* v. *Elwin*,(b) it did seem to me that the anxiously marked intention would have been completely disappointed, if in one of those cases I had taken the personal estate to have been received or ascertained, or in the other, if I had held the real estate to have been sold at
* 336 any other period than that at which those *events respectively took place in fact. But in *Entwistle* v. *Markland* and *Sitwell* v. *Bernard*, the Court seems to have decided that such words as "when received, when got in, when recovered, when laid out," do not so clearly mark the intention as to preclude the application of the legal presumption, and I have found a case in *Ambler*, which, though it is not fully stated there, yet by the register's book establishes the same principle. That case is *Hambling* v. *Lyster*.(a) From the register's book I find that the executors in their answer stated, that they had laid a case

(a) Ante, vol. 6. p. 159. vol. 11. p. 489.
(b) Ante, vol. 8. p. 547

(a) Amb. 401.

before Mr. *Wilbraham* upon two questions: 1st. Whether the receipt of the money due upon the mortgage, by the testator herself, was an ademption of the legacies given out of it: 2d. Supposing those legacies not adeemed, whether the legatees had a lien upon the new securities, in which the money received upon the mortgage had been laid out. Mr. *Wilbraham's* opinion was, that there was no ademption; but likewise that the legatees had no right to follow the money laid out in the new securities. That was a material point, as it appeared the estate was not sufficient for all the legacies. One question, therefore, was, whether those legatees were to abate with the general legatees, or were to be paid by preference out of the securities, upon which the money that had been received by the testator, had been laid out. The Master of the Rolls agreed with Mr. *Wilbraham* upon the first point; but differed from him upon the second; for the decree says, that so much of the money so compounded for, and received and placed out again by the testator, is still to be considered as a fund for the satisfaction of the plaintiff's legacies, and as the money due upon the two bonds (specified) was the readiest for the plaintiff's *satisfaction, * 337
that money was directed to be called in forthwith; and payment was decreed with interest from the end of one year after the testator's death, and costs were given out of the money so received, and if the said money should not be got in, or should not be sufficient for the plaintiff's satisfaction, liberty was given to apply.

In consequence of Mr. *Wilbraham's* opinion, an apportionment had been made of the whole estate; and 32*l.* had been apportioned to the plaintiff for his legacy of 100*l.* He refused to accept that, and was held entitled to satisfaction out of the specific security. Then, as the new securities were held to be substituted for the former, it is clear, all the words of the will must have been as appli-

1807. Wood v. Prnoyre

cable to the one as to the other; and the legatee could have no claim upon the one set of securities except in the same mode as he had a claim upon the other; that is, to be paid out of the securities, when the money due upon them should be received; and the decree accordingly follows the words of the will "when received." But that does not prevent interest running from the death, several years before it was received.

So, the opinion of the Court is, that the words "when received" did not suspend or postpone the right to interest.

Therefore upon these authorities the legatees in this case are entitled to interest at the rate of 4 *per cent.* from the death of the testator.



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## *KIRKMAN *against* MILES.

ROLLS February 16.

Land, under a devise in trust to be sold, not considered as real estate, the trust not being executed; but no act done, shewing an intention to alter the character impressed by the uses of the will.

An objection to the title of the heir upon this point prevailed.

THE bill prayed the specific performance of an agreement by the defendant for a purchase. An objection being taken to the title, the usual decree was made for a reference to the Master, to see whether the plaintiff could make a good title.

The circumstances, under which the objection was taken to the title, were these: *John Garland* being seised in fee, by his will, dated the 25th of *January*, 1769, devised the premises to trustees and their heirs, upon trust, that they, or the survivor, &c. should sell and dispose of the premises; and the monies arising by such sale to be divided equally amongst his three daughters, *Elizabeth*, *Ann*, and *Mary*, share and share alike; and also in like manner

to divide the rents and profits amongst his said daughters after his decease, until such sale could be made; and in case any of them should happen to die, before they should receive their respective shares, the share of her or them so dying to go to the survivors or survivor. The testator died soon after the date of his will.

The Master's report stated, that *Elizabeth*, *Ann*, and *Mary Garland*, the three daughters of *John Garland*, entered upon, and occupied the property devised to them, of which they were absolute owners in fee; and that *Mary* died without issue in 1772, at the age of 23; that no steps were taken by the testator's daughters, or by the trustees, to sell the estate; nor was any requisition made to the trustees by the daughters, or any of them, for that purpose. The Master therefore stated his *opinion, that the daughters must be considered as having elected to take the estate, devised to them as land; and the interest of *Mary* having descended to her surviving sisters, both of whom died without issue and without making any will, on which their interest descended to the plaintiff as their heir at law, a good title could be made. *339

Mr. *Hart*, for the plaintiff. Mr. *Richards* and Mr. *Wooddeson*, for the defendant.

The MASTER of the ROLLS observed, that the opinion of Lord *Rosslyn*, that property was to be taken, as it happened to be at the death of the party, from whom the representatives claimed, had been much doubted by Lord *Eldon;* who held, that without some act it must be considered as being in the state in which it ought to be; that Lord *Rosslyn*'s rule was new, and not according to prior cases, and in this case the time, only two years, was too short to presume an election.

1807.
Kirkman v Miles

The exception was allowed; and the bill was dismissed without costs.(a)

(a) See *Walker* v *Donne*, *ante*, vol 2. p 170. *Wheldale* v *Partridge*, *ante*, vol 5 p 388 vol 8 p 227. *Thornton* v *Hawley*, *ante*, vol. 10. p. 129 *Biddulph* v. *Biddulph*, *ante*, vol. 12. p 160.



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ROLLS.
*February* 16, 17.

## *LEIGH *against* NORBURY.

Settlement of personal estate upon a second marriage, upon trust to pay to such persons, &c as the settler shall by deed or will appoint; and, in default thereof, to his issue

Construction upon the whole that it was to operate, unless a subsequent instrument should be executed April or will therefore revoked.

The word "issue" unconfined by any indication of intention, includes all descendants. Intention necessary to restrain it, to children

Grandchildren therefore entitled with children *per capita*.

BY indentures, dated the 5th of *February*, 1798, in consideration of an intended marriage between *Hugh Worthington* and *Jane Reeves*, *Hugh Worthington* assigned to *John Norbury*, and *Richard Smith*, all his household and other goods, chattels, and effects whatsoever, and all and singular his bills, bonds, specialties, and other debts, whatsoever, and all other his personal estates, to hold to them, their executors, administrators and assigns, upon trust, to permit him, *Hugh Worthington*, to hold and enjoy the same during the term of his natural life; and from and immediately after his decease, to raise, collect, and receive, by sale of said goods, chattels, and personal estate and effects, or any part thereof, or by or out of the monies out at interest, the sum of 100*l.* and pay the same with all interest to grow due from the time of his death, to *Jane Reeves*, to be in full of her dower or thirds at common law, which she might claim out of the real or personal estate of *Hugh Worthington*, and upon farther trust to pay and apply the said personal estate and effects to such person or persons, and in such manner and form, as *Hugh Worthington* by his act or deed, or last will and testament in writing duly executed, shall give, bequeath, or appoint the same; and in default thereof, then upon farther trust to pay, apply, and dispose of the same, unto, and equally amongst the lawful issue of *Hugh Worthington*;

and in default thereof, to pay, and apply, and dispose of, and distribute the same amongst the next of kin of *Worthington*.

There was no issue of the marriage. *Hugh Worthington* died in *March*, 1800, not having made any appointment by deed or will pursuant to his power; but having made a will, previous to the date of the settlement, the will being dated the 7th of *March*, 1796, which the testator, after some pecuniary legacies, gave the remainder of his estate and effects, in five parts: one-fifth to *Mary Richardson*; another fifth to *Ann Norbury*; another to *Esther Leigh*; another to *William Worthington*, the younger; and the remaining fifth to his executors, in trust for *Martha Bailey* and her children; and appointed *George Leigh* and *William Worthington*, the younger, his executors. *Hugh Worthington* at his death left his wife *Jane*, and five children, by a former wife, surviving him: *William Worthington*, the elder, *Mary Richardson*, *Ann Norbury*, *Martha Bailey*, and *Esther Leigh*. * 341

The bill was filed by *George Leigh*, one of the executors, named in the will of *Hugh Worthington*, and *Esther*, the wife of *George Leigh*, and one of the five children of the testator, *Worthington*, by his first marriage, claiming one-fifth of the property belonging to the testator at the date of the settlement, insisting, that according to the true construction of the settlement, the personal estate, included in it, in the events, which have happened, belongs to his children, who were living at his death; and that the will was revoked by the settlement; and no part of the testator's property passed by his will, except such as might be acquired subsequent to the date of the settlement. The bill therefore prayed an account and distribution of the personal estate, belonging to *Hugh Worthington* at the date of the settlement.

1807. Leigh v. Norbury.

*The children, whose interest it was to claim under the will, by their answers submitted; that the will was not revoked by the settlement. Another question arose upon the answers of grand-children, claiming under the settlement, as issue.

Mr. *Richards* and Mr. *Benyon*, for the plaintiffs. Mr. *Hollist*, Mr. *Fonblanque*, and Mr. *Wetherell*, for the defendants.

It was admitted, that the will was not revoked to every purpose; as it would operate, if not as an appointment under the settlement, upon property afterwards acquired.

In support of the claim of grand-children under the description "issue," *Freeman* v. *Parsley*(a) was cited.

(a) *ante*, vol. 3 p. 421. *Sibley* v. *Perry*, *ante*, vol. 7. p. 522.

The MASTER of the ROLLS.

February 17.

When the occasion and purpose of this deed are considered, there can be very little doubt of the construction. The deed was intended to operate as a complete disposition of all the property comprised in it, subject only to a power in the settler to vary that disposition by any deed or will, that he might afterwards think proper to make. He had children by a former marriage. He had made a will, giving the whole of his personal property, subject to some legacies, among the children of that marriage, or their *children. He was about to enter into a second marriage. That will, of course, if it remained to operate, would exclude any issue by the second marriage.

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By this deed *Hugh Worthington* assigns to trustees, by a very large description, various items of personal estate, including, I suppose, all the personal estate he possessed,

or might during the joint lives of himself and his intended wife acquire. He then proceeds to declare the trusts. The primary trust is to raise the sum of 100*l.* for his wife in the event of her surviving him. The other trusts, excluding for a moment the reference to any deed or will, are to divide equally the whole property among his children; and, in default of issue, for his next of kin. Except therefore by the effect of the reference to a will, there is no part of this property, upon which a will could have operated; for the disposition was complete without any reference to a will. But not meaning that any of his issue should take absolutely, independent of him, he interposes a trust for such persons, and in such manner, as he, by deed or will, shall appoint. The object of that trust was only to preserve to himself a power over this property; not to preserve this property in the situation in which it stood at that moment. He meant to say, "my "property shall be governed by this deed, unless I "think fit to dispose of it in some other way." He did not mean, that it should be regulated by something, that had been done antecedently. That would be inconsistent with his object, to place the issue of both marriages precisely upon an equal footing. The children of the first marriage had no definite interest, for he might revoke his will. He meant to put the children of the second marriage upon a footing with them: but his purpose was not to give the latter class of *children, any absolute property, more than to the others. That object cannot be attained, unless this deed is considered as a disposition to operate, if a subsequent disposition is not made. With that view, the trust is for such persons, and in such manner, as by deed or will he shall appoint. It was quite inconsistent with that to preserve a subsisting will for any purpose whatsoever; for then this deed would not operate, unless some subsequent act had been done to make it operate: but his intention was, that it should operate, unless some subsequent act should be done to prevent its operation. No act was done. The construction would be * 344

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Leigh v. Morbury.

extraordinary, that this provision for the issue of the second marriage was subject to an antecedent instrument, by which that issue was to be excluded. By the construction of the defendants, if there had been issue of the second marriage, that issue would be totally destitute of a provision; and the event, that there is not issue of that marriage, cannot make a difference.

As to the other question, it is clearly settled, that the word "issue," unconfined by any indication of intention, includes all descendants. Intention is required for the purpose of limiting the sense of that word, restraining it to children only.

Declare, that the property is divisible among all the children, including grand-children; and a necessary consequence is, that the division must be *per capita*.



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## *TRIQUET *against* THORNTON.

ROLLS. *February* 18, 19

Stock, taken by the heir as real estate under a trust, to lay it out in land, not executed, considered as personal estate in him, under circumstances shewing his conception and intention to treat and dispose of it as personal property.

BY indentures of settlement, dated the 8th of *August*, 1765, previous to the marriage of *George Thornton*, and *Frances Wildash*, reciting the intended marriage, and that for making a jointure, and for making provision for the issue of the marriage, *Thomas Thornton*, the father of *George*, had agreed to transfer the sum of 10,000*l.* bank annuities, at 4 *per cent.* to trustees upon the trusts after mentioned, and that he had transferred, &c. it was declared, that the said sum of 10,000*l.* 4 *per cent.* bank annuities were so transferred upon trust, after the marriage that the trustees, or the survivor, his executors or administrators, or such others, on whom the trusts thereby created should or might devolve or come by virtue of these

presents, should with all convenient speed after request to them for that purpose made by the said *George Thornton* and *Frances*, his intended wife, or the survivor of them, or the executors or administrators of such survivor, sell, assign, and transfer the said sum of 10,000*l.* bank annuities, at and for such reasonable price and prices as could be had for the same; and should (with the consent and approbation of the said *George Thornton* and *Frances*, his intended wife, or the survivor of them, or the executors or administrators of such survivor) lay out and dispose of the money arising by the sale of the said bank annuities in the purchase of Manors, freehold messuages, lands, tenements and hereditaments, of an estate in fee-simple, in the county of *Kent*, or elsewhere, within 60 miles of *London*, and convey the same to the use of *George Thornton* for life, without impeachment of waste; remainder to trustees to preserve contingent *remainders; * 346 remainder to *Frances Wildash* for life, for her jointure, in bar of dower; remainder to the use of every or such one or more of the children of the said *George Thornton*, on the body of the said *Frances Wildash* lawfully to be begotten, for such estates, and in such proportions as they should jointly by deed or writing, &c. appoint, and for want of and until appointment, and after the determination of the estates to be appointed, and as to such parts, whereof no appointment should be made, to the use of all and every the child and children, as well daughters as sons, to be equally divided between or among them, if more than one, share and share alike, as tenants in common in tail-general, with cross remainders; and in default of issue, to the use of *George Thornton*, his heirs and assigns forever.

It was farther declared, that until such purchase of Manors, &c. to be settled as aforesaid, it should be lawful for the said trustees, and the survivor of them, and such others, on whom the trust thereby created might devolve,

from time to time, with the consent and approbation of the said *George Thornton* and *Frances*, his intended wife, or the survivor, in writing, testified, as therein mentioned, and after their deceases at the trustees' own discretion, to sell or dispose of, or receive in, the said 10,000*l.* bank annuities, or any part or parts thereof, and to place out the money arising from such sale or sales, or received in, as aforesaid, upon real or government securities, subject to the trusts before mentioned, and that the dividends, interest, and proceeds, of the said sum of 10,000*l.* bank annuities, and other securities, in which the money arising by sale thereof should be invested, should in the mean time, until such purchase or purchases of Manors, &c. should be made and settled, as aforesaid, go and be
* 347 paid to, and received by, the person or persons, to *whom the rents, issues, and profits, of the Manors, &c. so to be purchased, as aforesaid, would go, and for the time being belong and appertain, in case such purchase or settlement were made, as aforesaid.

The marriage took place. *George Thornton* by his will, dated the 5th of *July*, 1766, duly executed, to pass real estate, among other things, and without taking notice of the settlement, gave and devised all and every his messuages, lands, tenements, hereditaments, and real estate, whatsoever and wheresoever, with the appurtenances, unto and to the use of his son, *George Thornton*, and all and every other the son and sons of his body lawfully begotten, or to be begotten, to be equally divided between them, (if more than one,) share and share alike, as tenants in common, and not as joint tenants, and the several and respective heirs of the bodies of all and every such son and sons lawfully issuing; and in case one or more of such sons should happen to die without issue, then as to the share of him or them, so dying without issue, unto or to the use of the survivor or survivors of them, to be equally divided as aforesaid, and their several and respective heirs

and if all such sons but one should die without issue, or if there should be but one such son, then unto and to the use of such surviving and only son, and the heirs of his body; and for default of such issue, unto and to the use of all and every his daughters, as therein expressed, and, for default of such issue, to his uncle, *John Thornton*, his heirs and assigns forever.

He gave the residue of his personal estate as to two third parts to his son, *George Thornton*, and all and every other his son and sons, which should be living at his death, or born in due time afterwards, equally between them, share and share alike, at the age of 21; with *benefit of survivorship; and in case all of them should die under that age, then to and among his daughters; and, as to the remaining third, among his daughters; and if there should be no daughters, or all should die, before their shares should be payable, then to his sons; and, in case all his sons should die under the age of 21, and his daughters under that age, or unmarried, then he bequeathed 5,000*l.* part of the said residuum, to his cousin, *Thomas Dawson*, and the remainder of the said residuum he gave to his uncle, *John Thornton*, his executors and administrators. * 348

In *April*, 1767, *George Thornton* died, leaving his wife and two children, *George* and *Isaac-Thomas*, surviving him, of whom the latter died in *December*, 1767, and the former in 1769, both unmarried, and infants. *John Thornton*, great-uncle of *George Thornton*, the younger, was heir at law of him and his father.

By indentures of settlement, dated the 29th of *December*, 1786, previous to the marriage of *Catherine Triquet*, third daughter of *John Thornton*, reciting that *John Thornton* had agreed to advance the sum of 930*l.* for her immediate portion; and that at his death he would give

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and bequeath to her, or she should have or become entitled to such farther sum of money, share and proportion of, in and to, his real and personal estate as with the said 930*l.* should be equal to the share or proportion of his eldest son, *Thomas Thornton*, or of his younger son, *John Thornton*, or of his daughters, *Elizabeth* and *Jane Thornton*, or any of them, in and to such real and personal estates, of which he then was, or might die seised and possessed, except as after mentioned; and that the said 930*l.* had been laid out in the purchase of 1,000*l.* bank annuities, it was declared, that the said 1,000*l.* bank annuities was vested *in the names of *Thomas Thornton* and *James Hanson*, and that they should stand possessed of the same, upon certain trusts, for *Stephen Peter Triquet* and *Catherine Triquet*, and their issue; and *John Thornton* covenanted, that he would by his last will and testament give, devise and bequeath, to *Catherine Triquet*, or otherwise at his death, she, or *Stephen Peter Triquet* in her right, should have or become entitled unto such farther part, share, or proportion of, in, to, or out of all and every the real and personal estates, whereof *John Thornton* should die seised or possessed, as with the said 930*l.* should be equal to the part, share, or proportion, of his eldest son, *Thomas Thornton*, or of his youngest son *John Thornton*, or of his daughters, *Elizabeth* and *Jane Thornton*, or any one of them, both in possession and reversion, of and in such real and personal estates, whereof the said *John Thornton* then was, or should or might die seised or possessed, (except his freehold messuages or tenements, situated in *Norton Falgate* and *Fore Street London*, and in *Brentford*, which he designed for the sole and exclusive benefit of his sons, *Thomas* and *John Thornton*, or one of them,) it being his true intent, that *Catherine Triquet*, or *Stephen Peter Triquet* in her right, should have or be entitled to such portion or fortune as should be fully equal to the portion or fortune, both in possession and reversion, of any of them, the said *Thomas Thornton* and *John Thornton*, his sons, or of his daugh-

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ters, *Elizabeth* and *Jane*, *Thornton*, respectively; (except as aforesaid;) and it was declared, and *Stephen Peter Triquet* covenanted, that all such portion or fortune, whether real or personal, in possession, reversion, remainder, expectancy, or otherwise, which *Catherine Triquet* or *Stephen Peter Triquet* in her right, should have or become entitled to, under the covenant of *John Thornton*, should be conveyed, transferred, assigned, and settled, upon such *trusts, for such intents and purposes, and subject to such powers and provisoes, as were therein before declared concerning the said bank annuities, therein before settled, as should be then existing, and capable of taking effect, or as near thereto as might be. * 350

The marriage took place; and *Stephen Peter Triquet* died, leaving his widow, and *Catherine Triquet*, and *Stephen Peter Triquet*, his only children, surviving.

By another settlement, dated the 29th of *February*, 1788, previous to the marriage of *Thomas Morrell* and *Jane*, the fifth daughter of *John Thornton*, he entered into a similar covenant in favour of that daughter.

*John Thornton* by his will, dated the 13th of *May*, 1776, gave and devised all his freehold estates in *Kent* and *Middlesex* to his eldest son, *Thomas Thornton*, his heirs and assigns forever; and he also gave to his son *Thomas*, all his estate and interest in a freehold messuage at *Brentford*; and after a provision for his wife, and several legacies, he gave to his son *Thomas*, the sum of 1,000*l.* and as to all the rest and residue of his personal estate and effects of what nature or kind soever, either in possession or reversion, the testator gave and bequeathed the same unto, and to be equally divided between his children.

*John Thornton* died in 1789. In the suit(a) instituted by his son, *Thomas Thornton*, claiming the trust fund

(a) *Thornton* v *Hawley*, *ante*, vol. 10. p. 129.

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under the settlement of 1765, as heir at law of *John Thornton*, against the trustees of the stock, and *Leonard Bartholomew*, a decree was pronounced at the Rolls; declaring, that the stock was in the nature of *real estate; and decreeing, that, as such, it should be transferred to the plaintiff in that cause, *Thomas Thornton*. The stock was transferred accordingly.

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This bill was filed by *Catherine Triquet*, widow, and her two infant children, and by *Thomas* and *Jane Morrell*, and their infant children, and the trustees with *Thomas Thornton* in their marriage settlements, against *Thomas Thornton*, and the surviving younger children of *John Thornton*, the testator, praying, that the defendant *Thomas Thornton* may be declared a trustee as to one third of the bank stock and other funds for the purpose of the settlement of 1786; and as to another third for the purposes of the settlement of 1788; and may be decreed to transfer accordingly; the plaintiffs claiming under the covenants of the testator, *John Thornton*, in those settlements; he not having by his will, or otherwise, made the portion or share of the plaintiffs, *Catherine Triquet* and *Jane Morrell*, in his estate equal to the defendant, *Thomas Thornton's* portion: insisting, that the bank stock and bank annuities, acquired in lieu of the 10,000*l.* bank annuities, descended in the nature of real estate upon *Thomas Thornton*, as heir at law of the testator, *John Thornton*, and were specifically bound by the covenants of *John Thornton*.

The defendant, *Thomas Thornton*, by his answer insisted, that the 10,000*l.* bank annuities were not specifically bound by the covenant of *John Thornton*, in the settlement; and that, *John Thornton* not having made any disposition thereof, as such by his will, or otherwise, upon his death, they descended upon, and became vested in the defendant, as his heir at law, subject to the life interest

of *Frances Bartholomew*; and he insisted upon his title under the decree to the whole absolutely.

[* 352] *The defendants, *Martha, Elizabeth* and *John Thornton* insisted, that the said sum of 10,000*l.* bank annuities, was by the testator, *John Thornton*, treated in every respect as personal estate; and that by so treating it he made it personal estate; and that the same, or the funds acquired in lieu thereof, passed by the residuary bequest; especially as the testator had not at the time of making his will, or at his death, any estate or property in reversion, except the said 10,000*l.* bank annuities, expectant upon the death of *Frances Bartholomew*.

By an order, pronounced at the Rolls in 1805, an inquiry was directed, what real estates the testator, *John Thornton*, was seised of at the dates of his will and the settlements of 1786 and 1788, and whether at the date of his will he had any reversionary interest in any personal estate; and whether he did any other act, in which he treated the property as real or personal estate.

The Master's report stated some small premises, of which the testator was seised at the dates of his will and the settlements. The report also stated, that in 1765, one moiety of 7,000*l.* navy 4 *per cent.* annuities, part of the 10,000*l.* bank annuities, comprised in the settlement of 1765, was paid off by government at par; so that at that time the trustees, *Samuel Denne* and *John Thornton*, had 3,500*l.* in cash, which they received on that account, which sum, together with 42*l.* 18*s.* 9*d.* the money of *George Thornton*, was in 1766 and 1767, laid out in the purchase of 3,500*l.* bank 4 *per cent.* annuities, of 1763, making the whole in the names of the trustees in that fund 6,500*l.* and in navy 4 *per cent.* annuities 3,500*l.* In 1768, the 3,500*l.* the other moiety of the aforesaid navy 4 *per cent.* annuities, was received at par by the trustees; and

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1,625*l.* *being one fourth of the 6,500*l.* 4 *per cent.* bank annuities, was likewise received at par, producing together 5,125*l.* of which the trustees laid out 5,045*l.* 5*s.* in 3,100*l.* bank stock; leaving a balance in their hands of 79*l.* 15*s.* so that at that time the trust funds consisted of 4,875*l.* 4 *per cent.* bank annuities of 1763, 3,100*l.* bank stock, and 79*l.* 15*s.* cash. Previously to *October*, 1768, the 4,875*l.* 4 *per cent.* bank annuities were paid at par; and upon the 21st of *October*, in that year, the trustees invested 3,220*l.* in 2,000*l.* bank stock, and in 1769, they invested upon the 17th of *January*, 1,617*l.* 10*s.* in 1,000*l.* bank stock, and upon the 20th, 168*l.* in 100*l.* bank stock; which said sums, with the expenses, made 5,005*l.* 18*s.* being 51*l.* 3*s.* more than the trustees received from the said trust funds; which sum *John Thornton* advanced out of his own money. At the foot of the account, signed by *Frances Thornton*, *Samuel Denne*, and *John Thornton*, was a memorandum, that there remained 6,200*l.* bank stock in the names of the trustees, and there was due to *John Thornton* 51*l.* 3*s.* by him laid out more than was in the trustees' hands, in order to make an even sum; he being entitled to the whole 6,200*l.* stock, upon the death of Mrs. *Thornton*, as residuary legatee of *George Thornton*.

The Master also found, that by indenture, dated the 4th of *October*, 1769, reciting, that *Samuel Denne* and *John Thornton*, by the consent of *Frances Thornton*, had invested 4,875*l.* with 79*l.* 15*s.* the trust money remaining in their hands, and 51*l.* 3*s.* advanced by *John Thornton*, and which he was desirous should continue upon the trusts of the settlement of 1765, as to the 10,000*l.* bank annuities, he, *John Thornton*, having become entitled to the said trust monies upon the decease of *Frances Thornton*, making together 5,005*l.* 18*s.* in *the purchase of 3,100*l.* bank stock, it was declared that the trustees should stand possessed as well of the said 3,100*l.* bank stock, as also of 3,100*l.* bank stock therein also mentioned, upon the trusts of the said

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settlement of 1765, and that *Denne* and *John Thornton* did not claim any right or interest in the said 6,200*l.* bank stock for their own use; but only upon the trusts declared concerning the 10,000*l.* stock under the settlement of 1765.

The report also stated that the testator, *John Thornton*, had not at the time of making his will, any reversionary interest in any personal estate, except the reversionary interest in the said 10,000*l.* bank annuities.

The Master found that the testator, *John Thornton*, did the several acts before set forth, in which, in the Master's opinion, he treated the said 6,200*l.* bank stock as personal estate.

Mr. *Thomson* and Mr. *Roupell*, for the plaintiffs.

This fund of stock is to be considered as real estate, according to the construction already made by the decree in the former cause,(*a*) a direct decision of the point. The will of *John Thornton* does not advert to it; but it was taken as never having lost its original character. The acts of *John Thornton*, stated by the report, are acts as a co-trustee with *Denne*, not acts done by *Thornton* individually, as owner of the fund, and are such acts, merely consequential upon the act of government, as trustees, not having any interest in the fund, would be bound to do, viz. when *the funds were paid off by government, * 355 a reinvestment of the property upon the trusts of the settlement, the trustees not making any claim upon the stock for their own benefit. No act was done that marks the intention of *Thornton* to consider this fund as personal estate. After the change and increase of the fund by *John Thornton*, he executed an instrument, declaring, that he held it upon the trusts of the indenture of 1765, the instrument which the decree in the other cause considers as impressing upon it the character of land. The word

(*a*) *Thornton* v *Hawley*, *ante*, vol. 10. p. 129.

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"reversion," thrown into the residuary disposition in the will, among other words of form, as usual, without any specific view, cannot have the effect of altering the nature of the property. It is therefore still real estate, and bound by the covenant.

Mr. *Alexander* and Mr. *Courtney*, for the defendant, *Thomas Thornton*, also contended, that the fund must be considered as real estate, admitting the claim of the plaintiffs.

Mr. *Richards* and Mr. *Trower*, for the other defendants, the younger children of *John Thornton*.

Admitting that *John Thornton* took this fund originally as real estate, it was personal estate at the time of his death, having been converted by his acts. In 1769, he could not mean to make real estate the small sum, which he added for the purpose of making even money. He describes himself as residuary legatee, an apt description, if he considered the fund as money, inconsistent with reference to land. A meaning is to be attributed to every word in his will, if possible. If this fund is considered personal, he had at that time a reversionary interest to
* 356 answer the *word "reversion." Upon the other construction he had no reversionary interest in personal estate of any kind. That term, as applied to personal estate, is singular, though generally thrown into a conveyance of real estate. That word must be struck out, unless it is referred to this property.

Mr. *Thomson*, in reply.

There would be a considerable strain in giving this effect to the word "reversion" merely, as it is not properly applicable to personal property. Such a term in a will, containing a variety of general expressions, for the

purpose of comprehending all the property, cannot have any weight.

1807.

Triquet v. Thornton.

February [illegible]

The MASTER of the ROLLS.

It is admitted on all sides, that the decision of the case of *Thornton* v. *Hawley*,(a) does not in any degree affect the question that has arisen between the parties now before the Court. All that I decided in that case was, that the character of land was impressed upon the stock by the original settlement. There was no question whether *John Thornton* had done any acts or not, determining his election to take it as money. The only question was, whether the defendant, *Bartholomew*,(b) as administrator of the two sons, was entitled to take it as money, as having never been converted into land. It is admitted, that it was *competent to *John Thornton* to take it either as money or land; and it seems to me that he considered, and uniformly treated it, as money, to which he was entitled.

(a) *Ante*, vol. 10. p. 129.

(b) In this cause no claim was made under the residuary disposition by the will of *G. Thornton* in the event of the death of his children under age, to *John Thornton*.

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Upon the memorandum of 1769 two observations arise. First, he states himself as being entitled, not to land, to be purchased with the stock, but to the whole sum of 6,200*l.* stating himself to be so entitled as residuary legatee of *George Thornton*. Referring to the will of *George Thornton*, we find that *John Thornton* was in strictness of language, his residuary legatee, but was not in any sense his residuary devisee, for the real estate is given by a general description of all the testator's messuages, lands, tenements, and hereditaments, to his sons and their issue, with benefit of survivorship; and *John Thornton* takes the ultimate remainder in the whole; not in any residue left after a disposition of a part only of the real estate. But he takes the residue of the personal estate, for the will of *George Thornton* disposes of the residue of his personal estate among his sons and daughters; and in case

1807. of the death of his sons under the age of 21, and of his daughters under that age, and unmarried, gives 5,000*l.* part of the said residuum, to his cousin, *Thomas Dawson*, and the remainder of the said residuum to his uncle, *John Thornton*, his executors and administrators. *John Thornton* is therefore his personal residuary legatee; and though the Court held,(*a*) that, as this fund was in *George Thornton*, as land, therefore it passed as land from him to *John Thornton*, yet, when we are examining *John Thornton's* own conception of the subject, the circumstance, that he states himself to take it as residuary legatee, is material. He did not *conceive that this fund had yet received the character of land. It was still considered by him as being, what in fact it was, stock; and he conceived himself to be entitled to it as stock under the residuary bequest in his favour.

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(*a*) *Thornton* v. *Hawley*, ante, vol. 10. p. 129.

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In the same month, *October*, 1769, a declaration of trust was executed, upon which some stress was laid; declaring that *John Thornton* and his co-trustee should stand possessed of the stock, invested by them, upon the trusts of the settlement of 1765, which is represented as equivalent to a declaration, that it was to be considered as land. That declaration has no such effect. They could not make any other declaration as to the stock, than that it was purchased upon the trusts of the original settlement; but *non constat*, how *John Thornton* chose to have it, when laid out; whether he chose to have it as land or money. That declaration by the trustees, that the stock is not their own, but is held upon the trusts mentioned in the settlement, as to the 10,000*l.* stock, goes no way to determine that question. It is no more than a declaration, that the stock is not their own, but merely trust stock; and that, being so, they could refer to nothing, as directing the trustees, except the settlement of 1765.

The next consideration is as to the will of *John Thornton*, in 1776, by which, after devising his real estate, and

giving some legacies, he gives all the rest and residue of his personal estate and effects of what nature or kind soever "either in *possession* or *reversion*," to his children. An inquiry having been directed, whether the testator had any personal property in reversion, except this stock, it appears that he had none. That is undoubtedly a circumstance, shewing that he conceived himself to have *some personal property, to which these words would apply. The term "reversion" is not very usually introduced in bequests of personal property. If this fund was considered by him as personal property, it undoubtedly was property, to which he was entitled in reversion; as there was a previous interest for life subsisting; and the circumstance, that he had no other property, to which these words can apply, raises the argument in favour of the children, with reference to his own conception, that he had personal property in reversion. * 359

Here it seems to be left; for the instrument of 1776, is at most ambiguous, speaking of real or personal estate in possession or reversion. If any argument whatsoever can be drawn from that, it is rather an argument of the same kind with that which is built upon the will, for the words are almost of course as to real estate; but some motive should appear for introducing them as to personal estate, to which in that instrument they equally apply. At most that leaves the question as to the intention precisely where it was; and the preceding facts shew, that *John Thornton* conceived this fund was personal estate, and meant to treat it as such, and then undoubtedly it was competent to him to dispose of it in that manner. From the beginning of the cause I was convinced, privately, that he had not the least idea that this property was land; my only doubt was, whether there was judicial evidence, that he considered it as personal property.

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## *GREENAWAY *against* ADAMS.

February 21.

Witnesses, examined in the cause, re-examined before the Master upon different interrogatories by order.

A MOTION was made by the plaintiff, for an order to authorise the examination of witnesses upon interrogatories before the Master, having been before examined in the cause. The decree(*a*) directed an inquiry as to the damage sustained by the plaintiff, by the non-performance of the agreement. A state of facts was carried in before the Master, who, thinking it not substantiated by the evidence in the cause, directed interrogatories to be exhibited. Some of the witnesses, who had been examined in this cause, were accordingly re-examined upon different interrogatories; but afterwards the Master, conceiving, that as those witnesses had been before examined, they ought not to have been re-examined without an order, directed, that an application should be made to the Court.

(*a*) *Ante*, vol. 12. p. 395.

Notice was given, and the motion was not opposed.

Mr. *Thomson*, in support of the motion.

It is true, that a witness cannot be re-examined upon the same interrogatory without an order;(*b*) the reason of which is obvious, and the rule goes farther; that he cannot be re-examined even upon different interrogatories; the principle of which is not so evident. These persons are the only witnesses, who can give the plaintiff the benefit of this decree, as without their testimony, the proof required by the Master, cannot be given.

(*b*) *Prac. Reg.* 420.

 *The Lord CHANCELLOR made the order, directing that the fact should be specially stated, that the examination had been taken without a previous application for an

order; that notice of the application was given, and no objection made.

1807.

Greenaway v. Adams.

## SALT'S CASE.

February 21.

No objection to a commitment of a bankrupt by the commissioners, that the order of commitment was made in the absence of the bankrupt, and that it bore date the day the examination took place, though made some days afterwards.

A MOTION(a) was made for a *habeas corpus*, for the purpose of discharging a bankrupt from an order of commitment by the commissioners.

The circumstances, stated by the affidavit, upon which the motion was made, were, that the bankrupt, while in execution in the King's Bench prison, at the suit of the petitioning creditor, was taken down to *Manchester*, where the commission was executed, for the purpose of being examined before the commissioners on the 29th of *July*; that the day after the examination, the commissioners not having made an order for commitment, the bankrupt was taken by the solicitor back to the King's Bench prison, that the commissioners expressed displeasure at that circumstance, and several days afterwards made the order for commitment.

Mr. *Manley*, in support of the motion, took three objections; 1st. That the commissioners had acted without jurisdiction; as, the bankrupt being in execution, they ought to have gone to him: 2dly. That the bankrupt ought to have been present, when the order of *commitment was made: 3dly. That the order was dated on the 29th of *July*, though it was made some days afterwards. * 362

The Lord CHANCELLOR said, the question upon the first objection would be, whether there was an escape,

(a) *Taylor's* case, *ante*, vol. 8. p. 328. *Ex parte Nowlan*, *ante*, vol. 11. p. 511.

1807.

Salt's Case.

and could not arise upon this application; that the act of Parliament(a) does not require the presence of the bankrupt, when the order of commitment is made; and the commissioners may, if they think it necessary, deliberate upon the examination, before they make their order; and 3dly, that the date of the order was proper; as upon a conviction, the magistrates draw up the order according to the date of their minutes.

(a) Stat. 5 Geo. II. c. 30. s. 16.

No order was made.



WEBSTER *against* BIRCHMORE.

*February* 23, 24.

The presumption of death from length of time has relation to the commencement of the period.

THE Master's report stating, that it could not be presumed, that *John Herfill* died during the life of *Susannah Herfill*, an exception was taken. The circumstances were, that *John Herfill* had not been heard of during 23 years previous to the date of the report; but of that period no more than between five and six years had elapsed before the death of *Susannah Herfill*. When he last appeared, he was in a very bad state of health, and was to have returned in six months.

The *Solicitor-General* and Mr. *Girdlestone*, in support of the exception, contended, that the report proceeded

* 363 *upon misapprehension of the effect of length of time, as raising the presumption. The period of five or six years, though certainly not sufficient to establish the presumption, raises a considerable suspicion of the death of the party; and when a sufficient time has run to confirm that suspicion, which is the only effect of the length of time, the relation must go to the first moment of the uncertainty as to his existence.

Mr. *Richards*, for the report.

The Lord CHANCELLOR.

My opinion is very clear, that this exception must be allowed. If at the end of five or six years we were to have pronounced upon the fact of this man's existence, the conclusion that he was then living, would not perhaps have been the subject of exception; but after this lapse of time, since he appeared, in a desperate state of health, and was to have returned to his relation in six months, surely he must be taken to have died.

Exception allowed.



1806. *November* 14, 15. 1807. *February* 23.

## WITTS *against* STEERE.

Distribution by the bank of extraordinary profit, beyond the regular dividend, not by way of increased dividend, but as a *bonus*, taken as capital; and the manner, in which it is given, makes no difference.

LEE STEERE, by his will, dated the 4th of *February*, 1782, bequeathed to trustees, their executors, &c. among other things, all the monies, which should be standing in his name at the time of his decease in the capital stock of the bank, upon the following trusts; that the trustees, &c. "shall from *time to time as the same shall become due, "receive all the dividends and profits of all my share of "the capital stock of the bank of *England*, and pay the "same and every part thereof" unto his daughter, *Martha Witts*, for life, for her separate use; and after her decease he gave and bequeathed all the dividends, interests, and profits, of his said bank of *England* stock, to his grandson, *Lee Steere Witts*, for life; with a direction, that such dividends, or so much thereof as the trustees shall think proper, should be paid by them for his maintenance and

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1807.

Witts v. Steere.

education, to be paid to him when he shall attain the age of 21; and after his decease, the testator gave and bequeathed all the capital stock of the bank of *England*, and all his said three and a half *per cent.* bank annuities, among the daughters and younger children of his grandson; equally to be divided among them, as tenants in common, and to be a vested interest at the age of 21, or marriage of daughters; and in failure of daughters and younger children, directed, that the said bank stock and bank annuities should be sold, and the produce vested in real estates, to the same uses as his settled estates; if there should be any child or grandchild of his daughter living at the decease of his grandson, and entitled to his settled estates; and if there should be no such child, &c. he gave and bequeathed all his said capital stock of the bank of *England*, to *Thomas Boddington*, his executors, &c.

The testator was at his death possessed of 7,200*l.* capital stock of the bank of *England*. In 1792, under a bill filed by the grandson and others, an order was made, that the 7,200*l.* bank stock, then standing in the name of the accountant-general, should be placed to the credit of the cause, and to the account of the plaintiff, *Martha Witts*, and that the dividends should be paid to her for life, with liberty to apply.

*365 *On the 19th of *September*, 1805, at a general court of the governor and company of the bank of *England*, the governor acquainted the court, that the court of directors, having considered the state of the bank accounts, felt itself justified in recommending to the general court to order at the present time a participation of 5*l.* *per cent.* out of the interest and profits of the corporation, over and above the half-yearly dividends of three and a half *per cent.* and that both the above sums be included in one warrant; whereupon the question was put, that the court do order a dividend to be made of 8*l.* 10*s.* *per cent.* in-

terest and profits, for the half year ending the 10th of *October* next; that a general court be holden on *Tuesday*, the 24th inst. then next, to take the ballot on the said question, which was carried in the affirmative.

At another general court, held accordingly on the 24th of *September*, the following question was put and balloted for: "That this court do order a dividend of 8*l*. 10*s*. *per* "*cent*. interest and profits, for the half year ending the "10th *October* next," which was also carried in the affirmative.

The bill was filed by *Richard Witts*, and *Martha*, his wife, praying that the plaintiffs may be declared entitled to the sum of 612*l*. received by the accountant-general, under the resolutions of the bank, as a dividend on the sum of 7,200*l*. bank stock; or in case the Court shall be of opinion that the said 612*l*. or any part thereof ought to be invested in the public funds, upon the trusts of the will, that directions may be given accordingly.

The defendants, the children of the grandson, the younger children of the plaintiff, and *Boddington*, submitted *by their answers, whether the sum of 612*l*. did become payable to the plaintiff, *Martha Witts*. * 366

The *Attorney-General* and Mr. *Phillimore*, for the plaintiffs.

It is not disputed now, that the decisions that have taken place upon this point,(*a*) are not supported by law. But this case is distinguished. This is given expressly and precisely as interest and profits; in the other cases there is a distinct resolution of the bank for a participa-

(*a*) *Brander* v. *Brander*, *ante*, vol. 4. p. 800. *Paris* v. *Paris*, *ante*, vol. 10. p. 185. *Irvine* v. *Houston*, in the House of Lords, 1802, upon appeal from the Court of Sessions in *Scotland*. *Clayton* v. *Gresham*, *ante*, vol. 10. p. 288. *Barclay* v. *Wainewright*, post.

1807. Witts v. Steere

tion of stock in one instance, in the others, of money; which it was fairly observed, might as well be taken to be capital, as interest and profits, especially as *3l. 10s. per cent.* was given as interest and profits, and that description was not annexed to the farther division of *5l. per cent.* The *5l. per cent.* must be taken to be part of the property of the bank, whether to be termed floating capital, or by any other name. The decisions that have been made, therefore, do not touch this case; in those instances the dividend being declared, not of *8l. 10s. per cent.* interest and profits, but *3l. 10s. per cent.* interest and profits, and a participation of *5l. per cent.* not as interest and profits. The only question in this case is, whether the bank has authority to decide what is the interest and profits they may make. Their declaration, that they make a dividend as interest and profits, is binding upon the court: when they make a distinction between dividend, and the farther subject of participation, the latter must be taken as capital, as their property. The other construction will
* 367 create great confusion in this species *of property. Upon what principle can it be maintained, that the tenant for life can take only the regular permanent dividend, and cannot have this farther profit, though given as interest and profits, not being the regular, permanent dividend; the same in *October* as in *April*? The charter does not require that the dividend shall be the same in each half year. In this respect what is the distinction from any other trade? It is not necessary that this interest and profit should have been made within the half year. Is the right of the tenant for life repelled by the mere circumstance that the profit of one half year exceeds that of another? Suppose an increase of the profit of a trade in one year, the effect of stock in hand and a short crop, is not that excess to be divided as profit! Whence arises the necessity of this uniformity of dividend upon this particular subject? Ought this Court to make a decision, having the effect of a general regulation, enjoining the bank always to make the same dividend, the bank alone having the

1807.

Witts v Steere.

materials for forming a correct judgment as to the proper amount of the dividend? Great public inconvenience must be the consequence. The bank may at a particular period have a considerable excess of profit, which they cannot rely upon as permanent; ought they, then, rashly to declare a dividend in proportion to that excess, liable to as sudden a reduction, disappointing the expectation they had raised? If this is profit, whether made in the last half year, or in the course of the year, the tenant for life cannot be deprived of it. Its character as profit is established by the resolution of the bank, declaring it profit; upon which resolution a Court of Justice cannot speculate. It is competent to the general court to declare the increase and variation of the profit. If that was done with a fraudulent view to the advantage of the tenant for life, at the expense of the remainder-man, that *charge must be established by evidence. The doubt has arisen from the manner in which the bank have formerly done this, making a distinction between what they gave in this way, and interest and profit; but by this resolution it is given expressly as interest and profits. This case, therefore, may be distinguished without impugning the other decisions, which the Court will not be anxious to follow under different circumstances. It may also be distinguished upon the particular words of this will. In the case(a) in the House of Lords, a residue only was given, not the capital, as distinguished from the interest and profits, as in this will.

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(a) *Irvine* v. *Houston*, upon appeal from the Court of Session, 1802.

The *Solicitor-General* and Mr. *Bell*, for the defendants.

The Lord CHANCELLOR.

*February* 23.

It seems to me impossible to consider this testator as having had in contemplation any thing touching these profits, under the term *bonus*, and as expressing his will in this particular way, to avoid the consequence of the

1807.

Witts v. Steere

course of the bank, not increasing the dividend, but making this distribution by way of *bonus;* nor was the case argued upon that ground. In the direction to the trustees to receive all the dividends and profits, "from "time to time as the same shall become due," this expression is not immaterial. These profits cannot be said to become due. They are in the discretion of the bank. The profit that becomes due, in the ordinary interpretation of that word, is the ordinary fruit of the stock. The
* 369 declaration of the bank is for a participation of *5*l. per cent.* "out of the interest and profits of the corporation, "over and above the half yearly dividends," out of the general interest and profits; at what time, whether during the interest of this tenant for life, or any other period, does not distinctly appear. This *bonus* of 5*l. per cent.* ends with that half year, to the 10th *October*, 1805. The dividend is not in any respect altered. The ordinary dividend proceeds as usual. The question is, how this *bonus* of 5*l. per cent.* out of the interest and profits is to be considered, whether as part of the capital, or to go to the tenant for life. It is not for me to say how this would be, if it were *res nova.* The only principle upon which it can stand, is the principle that seems to have governed the House of Lords in the case of *Irvine* v. *Houston;* that whatever conduct or language the bank may hold, if they do not increase the dividend, but take this mode of distributing the profit, it is a part of the capital, and does not belong to the tenant for life. The bank may so conduct themselves as to avoid the question altogether; for they may increase the dividend, and that increased dividend would be the ordinary fruit of the stock. But if they do not take that course, the manner in which they give the *bonus* cannot make a difference. Though they may express it differently, the thing in fact is the same.

The decree declared, that the money which became due on the 10th of *October*, 1805, in respect of the 7,200*l.* bank

stock, ought to be considered as principal; and that the plaintiff, *Martha Witts*,* was entitled only to receive the interest during her life.(*a*)

1807.
Steere v. Witts.

(*a*) *Barclay v. Wainewright*, post.

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## *KENEBEL *against* SCRAFTON.

*February* 22. 24.

Under a bill by the first mortgagee, the second and third mortgagees consenting to a sale, the fund proving deficient, the costs are paid in the first place.

UNDER a bill by the first mortgagee, a sale having been directed, with the consent of the second and third mortgagees, and the produce not being sufficient to pay them all, a question was made, whether the costs should be paid in the first place, which was opposed by the third mortgagee.

The Lord CHANCELLOR.

Clearly the costs must be paid in the first place. In the case of a decree under a bill by creditors for a sale, the mortgagees are untouched by the decree, but if they come in and consent to a sale, they are bound. The first mortgagee might have foreclosed, and the third mortgagee could have prevented the effect of that only by redemption.

The costs were accordingly ordered to be taxed in the first place.

1807

ROLLS.

February 19, 23.

Bequest to the children of *A* who should be living at the testator's decease, equally; with survivorship, in case of death without leaving issue, if leaving issue, the issue to have the parent's share.

The survivorship cannot be restrained to the period of the testator's death, as upon that construction the clause would be repugnant.

## SHERGOLD *against* BOONE.

CALEB SMITH, by his will, dated the 8th of *March*, 1802, gave, devised, and bequeathed, all his freehold and leasehold estates, monies at interest, upon government or real securities, *&c. and all other his estate and effects, whatsoever, to his executors, upon trust to sell, and to divide the money arising from the sale, together with the money out at interest, or in the funds, &c. into six equal shares and proportions; and to pay and transfer the same as after mentioned; viz. one-sixth part thereof to and amongst the children of *Rose Anne Boone*, (late wife of *Thomas Boone*, and daughter of *Sarah Shergold* deceased,) in equal shares and proportions, upon their attaining the age of 21 years, with benefit of survivorship, in case any of them should die before 21; one other sixth part thereof to and equally between *Julia Cox*, *Frederick Cox*, children of *Harriet Cox* deceased, (late wife of *John Cox*,) another daughter of the said *Sarah Shergold*, upon their attaining the age of 21, with the like benefit of survivorship, in case either of them should die before the age of 21, and as to the remaining four-sixth parts or shares thereof, upon trust to pay and divide the same unto and amongst all and every the children of said *Sarah Shergold* deceased, who should be living at the time of his, said testator's decease, (save and except *Samuel Shergold*, the eldest son of said *Sarah Shergold*,) in equal shares and proportions; and in case any of the said last mentioned children should happen to die without leaving issue lawfully begotten, then and in such case, the share and shares of him, her, or them, so dying, should go to the survivors or survivor of them, (save and except the said *Samuel Shergold*,) in equal shares and proportions; but, in case they should leave issue lawfully begotten, such issue should be entitled to the share of their deceased parent in equal shares and proportions upon attaining their respective ages of 21

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years; the interest and proceeds thereof, in the mean time, to be paid and applied for and towards their respective education and advancement in life. 1807. Shergold *v.* Boone.

*The testator died in 1804, leaving *George*, *Sarah*, and *Elizabeth Shergold*, the plaintiffs, and *Samuel Shergold*, and *William Shergold*, the only children of *Sarah Shergold*, deceased, surviving him. * 372

The bill prayed a declaration, that the plaintiffs are entitled under the will, to be paid three-sixth parts or shares of the trust fund; and that the plaintiff, *Sarah Shergold*, is entitled to another sixth-part as the personal representative of *William Shergold;* who was dead without issue.

The bill charged, that the testator had executed a prior will, on the 11th of *July*, 1800, devising and bequeathing all his freehold, leasehold, and personal estates, upon trust, to pay the rents and profits, &c. to *Sarah Shergold*, for life, for her separate use, and after her decease to sell, and divide the produce with his residuary personal effects, in five parts; and as to four-fifth parts, to divide the same unto and amongst all the children of *Sarah Shergold*, who should be living at her decease, (except *Samuel*,) in equal proportions; and in case any of said last mentioned children should happen to die during the life-time of said *Sarah Shergold*, without leaving issue, then the share or shares of him, her, or them, so dying, should go to the survivors or survivor of them, (save said *Samuel Shergold*,) in equal parts; but in case of issue lawfully begotten, then such issue should be entitled to their deceased parent's share in equal proportions at their respective ages of 21 years; the interest and proceeds thereof, in the mean time to be applied for their education and advancement in life.

1807. Shergold v. Boone.

*The bill farther charged, that upon the death of Sarah Shergold, after the execution of that will, the testator gave instructions to his solicitor to recopy that will, in order that it might be re-executed by him, leaving out the name of Sarah Shergold; and instead of making the property distributable at her death among such of her children as should be then living, to make it devisable among such of her children as should be living at the testator's decease, and the issue of such of them as might die in his life; and, that by mistake, the words "in "my life-time," were omitted after the words "shall "happen to die."

The solicitor, who drew the will, being a defendant, as one of the trustees, by his answer admitted the mistake.

Mr. *Alexander* and Mr. *Wetherell*, for the plaintiffs.

Either upon the construction of the will, or upon the ground of mistake in framing it, these plaintiffs are entitled. With reference to the former head of relief, the question is, to what period the indefinite clause of survivorship is to be applied. In other parts of this will the survivorship is limited expressly to the periods, when the shares are payable. The inclination of the Court is against indefinite survivorship; the modern course has been to refer it to the death of the testator; especially if that is the period of payment. These words have been applied to the period of payment upon circumstances; with a view, for instance, to the payment of a portion for the benefit of the party. In the original conception of this bequest these sums are made payable among the children of *Sarah Shergold*, who shall survive the testator; the point of time, that has been applied in most of the cases to regulate the
*374 *period of survivorship. The consequence will be most inconvenient, if these words are to have an effect, extending the period of survivorship beyond the death of the

testator. It must then extend to the survivor of all these persons, with cross-limitations continuing between them; and their interests will in effect be reduced to mere interests for life; a construction that must entirely defeat the general intention of distribution; not of future, exclusive possession by a single individual, who should happen to survive.

1807. Shergold v. Boone.

If the construction of the will is against the plaintiffs, the other question is, whether by mistake the testator has not revoked more of the former will than he intended; and whether parol evidence of that mistake may not properly be admitted. The peculiar province of a Court of Equity is to relieve against accident and mistake, as well as fraud. This is either accident or mistake, the effect of which can be corrected only by evidence, which is received, not to construe the will, as there is neither *ambiguitas latens* nor *patens*, but to introduce words that were omitted by mistake. In *Baker* v. *Payne*,(a) the objection to evidence for that purpose was overruled. In *Thomas* v. *Thomas*,(b) evidence was admitted as to the name of the devisee. Upon the same ground, on which evidence would be admitted, the answer of the trustee ought to be read, or at least an inquiry should be directed.

(a) 1 *Ves* 456. See *ante*, vol. 6 p. 336

(b) 6 *Term Rep*. 671.

Mr. *Richards*, and Mr. *Hall*, for the defendants, admitting, that the intention could not be doubted, upon the answer of the trustee, if it could be considered as *binding the interests of the other parties, which upon the case of *Morse* v. *Royal*,(a) is doubtful, relied upon the words, as they stood in the will, containing a simple limitation, though perhaps not the most convenient, not contrary to any rule.

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(a) *Ante*. vol. 12. p. 355.

The Master of the Rolls, upon the case of *Brown* v. *Bigg*,(b) observed, that he had occasion in that instance

(b) *Ante*, vol. 7. p. 279.

1807.

Shergold v. Boone.

General clause of survivorship in a will upon a tenancy in common referred to the testator's death.

to consider the effect of a general clause of survivorship; and found the result of the authorities contrary to what had fallen from the Court during the argument, founded upon what Lord *Alvanley* had said in one of the cases; and that in a great majority of them the survivorship had been referred to the period of the testator's death.

The MASTER of the ROLLS.

*February* 23.

Whatever the actual intention of this testator may have been, it is impossible to put upon this will the construction for which the plaintiffs are obliged to contend. The bequest is not to all the children generally, but to such only who shall be living at the testator's decease, with the exception of one. Therefore the children who died during his life, had nothing, either to lapse, or to descend to issue, or to survive to the other children. The children who shall be living at his death, are the original and sole legatees; and therefore the case, afterwards provided for, is the death of any of those children, who are the objects of the former bequest. Other children are not in any degree concerned in that bequest; but are excluded as much as
* 376 any stranger; and when the testator provides, *that the shares of the children shall in certain events belong to their issue, and, in default of issue, to the surviving children, he is speaking only of the shares of those children, to whom he had given shares. That is the only construction, not only that the words will bear, but that can be made upon the reason of the thing.

If indeed the words, said to have been omitted by mistake, "in my life-time," had been introduced, the clause would have been repugnant with itself, for then the effect would have been this; that the children, living at his death, should have the whole; but the issue of such of them, as should die during his life, should have a part.

If, however, those words had been introduced, the Court might perhaps have rejected the former part of the description, "living at the time of his death;" in order to make sense of the clause, and give effect to what then perhaps would have appeared to be the governing intention. But, as it stands, there is no ground, upon which any part can be rejected; and it cannot possibly admit the plaintiff's construction.

Evidence of mistake not admissible to affect the construction of a will

As to the evidence of mistake, as no evidence has been offered, it is unnecessary to say, whether it could or could not have been admitted; still more so, not knowing exactly, what the purport of the evidence would be, to say, what would be the effect of it, if admissible. I am disposed to think, the evidence if offered, would not be admissible.(a) As to the answer *of the executor, it cannot have any effect whatsoever. I am called upon to make a decree upon the face of the will, and cannot take the construction from the answer of the executor. * 377

The bill was dismissed.

(a) *Lord Walpole* v. *Lord Orford*, *ante*, vol 3 p 402 As to the case of contract, and the distinction, whether evidence of mistake or surprise is produced to support, or to resist a specific performance, see *the Marquis of Townshend* v. *Stangroom*, *ante*, vol 6. p. 328 and the judgment in *Rich* v. *Jackson*, in the note (c), 331

## QUARRELL *against* BECKFORD.

*February* 26.

Though a mortgagee shall not be deprived of possession while any thing remains due, where he refused to swear, that any thing was due a consignee, the estate being in the West Indies, was appointed.

THE decree, pronounced in this cause at the Rolls, and affirmed upon appeal, directed an account, consider-

1807.

Quarrell v. Beckford.

ing the defendant as mortgagee in possession of estates in *Jamaica.* The plaintiff suggesting, that a large balance was due, the defendant declining to answer the interrogatories, requiring him to state, what, if any thing, was due, a motion was made for the appointment of a consignee.

The *Solicitor-General* and Mr. *Leach*, in support of the motion, cited the case of *Chambers* v. *Goldwin*,(a) in which Lord *Eldon* laid down the rule, that though possession shall not be taken from a mortgagee, until he is paid, the Court will require him to state upon his oath what he believes to be due; and will take the possession from him upon his being paid what he so states to be due; making him give security to refund, if it shall appear upon the account, that not so much is due. This defendant declines to answer, not only as to what is due, but whether any thing is due? the interrogatories being all framed with that view, requiring him to state what, "if any thing," is due.

(a) *Ante*, vol 5. p 654 vol 9. p 254 not reported as to this point.

* 378 *The *Attorney-General*, Mr. *Richards*, and Mr. *Thomson*, for the defendant, distinguished this case from *Chambers* v. *Goldwin*, which was the case of a clear mortgagee, bound to keep accounts as such; this defendant having considered himself as owner; and is therefore, unable to state what is due, or whether any thing is due.

The Lord CHANCELLOR.

This defendant, having filed a bill of foreclosure, in 1769, and having in 1784, obtained possession under a writ of assistance, not only of the estates, comprised in his mortgage, but also of other estates, to the possession of which he was not entitled as mortgagee, and having

from that period continued in possession of both those estates, says fairly, he considered them as his own, by foreclosure; and did not conceive, that he was in possession as mortgagee. That mistake was corrected by the decree at the Rolls, affirmed here upon appeal, by which he is considered merely as mortgagee in possession; and, therefore, I can consider him as standing in that character only; and he cannot contend, having dealt with the property of another person as his own, that the account is to be taken, as if that mistake had not taken place. There is certainly great difference between a mortgage of an estate in *England*, and an estate in this situation, abroad; as to which there must be much more difficulty in putting in an examination for such a length of time with all just allowances. I admit, that the defendant cannot perhaps with precision answer the interrogatories, requiring this account; as if the estate was situated here. But that difficulty cannot alter the rule; according to that, which was laid down with great reason and justice in *Chambers* v. *Goldwin*, that if the mortgagee, though he cannot *state with any great precision, what sum is due to him, can say upon his oath, he believes a sum of money is due, and his mortgage is not satisfied, the Court will not take the possession from him, even for the purpose of placing it in the hands of the Court, but, when he cannot say a shilling is due, every interrogatory putting the question, whether any thing is due, neither the mortgagee, nor the mortgagor, shall have the possession; but the Court will take it. If the defendant wishes to have an opportunity to make an affidavit, he ought to have it; and that offer is now made. If he declines that offer, I must act upon the principle of *Chambers* v. *Goldwin*. * 379

The defendant declining to make an affidavit, the order for a consignee was made.

1807.

Bonner v. Bonner.

February 23 27.

Trust of a term by will to pay the several legacies "hereby given," and also "the several other legacies hereinafter bequeathed" The subsequent part of the will contained a few small legacies, and a codicil unattested, reciting, that the legacies given by the will to the testator's daughters, were not an adequate provision, gave each of of them a farther legacy, "in addition to the said legacies" given them respectively by the will.

The legacies by the codicil are not charged upon the real estate.

Assets marshalled.

## BONNER *against* BONNER.

*THOMAS BONNER* by his will, dated the 14th of *June*, 1794, duly executed, according to the statute of frauds,(*a*) to pass real estate, gave to his eldest son, *Robert Bonner Warwick*, declaring, that he was otherwise sufficiently provided for, the sum of 500*l.* and a silver coffee-pot, on condition of keeping the testator indemnified against the payment of 700*l.* as his surety by bond. The will then proceeded thus:

*" Also I give to my daughter, *Isabella Lock*, who has " already received her portion, the sum of 20 guineas. " Also I give to my daughter, *Sarah Bonner*, the sum of " 1,200*l.* and to my daughter, *Ann Bonner*, the sum of " 1,200*l.* to be paid to them severally and respectively " within six months next after my decease, with interest " from the time of my death, at 4 *per cent.* and I give to " my daughter, *Maria Grace Bonner*, the sum of 1,200*l.* " to be paid to her at her age of 21 years, or day of marriage, which shall first happen, with interest in the " mean time from my death, at 4 *per cent.* to be applied " towards her maintenance and education; and if my said " daughter, *Maria Grace Bonner*, shall happen to die under the age of 21 years, and unmarried, then, and in " such case, the said legacy of 1,200*l.* given to her as " aforesaid, shall go to, and vest in, and belong to, my " daughters, *Sarah* and *Ann*, in equal shares and proportions."

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The testator then devised all his real estates in the counties of *Northumberland* and *Durham*, to trustees their executors, &c. for the term of 1,000 years, and subject thereto, to the use of his second son, *Thomas Bonner* for life, and of his first and other sons, in strict settlement with remainders over.

(*a*) Statute 29 *Car.* II c. 3.

1807.

Bonner v Bonner.

The will then directed, that in case, *Margaret*, the wife of the testator's son, *Thomas*, shall happen to survive him, then all his said real estates shall stand charged and chargeable with the payment of an annuity of 50*l.* to her for life, and then made the following declaration :

"And I do hereby declare, that the said messuages, "lands, tenements, hereditaments and premises, *so li- "mited or mentioned to be limited, in trust, to them the "said *William Darnell* and *Robert Rayne*, their executors, "administrators and assigns, for the term of 1,000 years, "as aforesaid, are so limited to them upon trust, that "they the said *William Darnell* and *Robert Rayne*, and the "survivor of them, and the executors, administrators, and "assigns of such survivor do, and shall by and out of "the rents, issues and profits of the said messuages, lands, "tenements and hereditaments, or by mortgage thereof, "or a competent part thereof, for all or any part of the "said term of 1,000 years, raise, levy, and pay to my "said son, *Robert Bonner Warwick*, and my said daugh- "ters, the several legacies or sums of money hereby "given and bequeathed to them respectively, with interest "for the same as aforesaid, and also the several other le- "gacies hereinafter bequeathed, and also the said annuity "or yearly sum of 50*l.* given to my said daughter-in-law, "*Margaret Bonner*, and her assigns, for and during the "term of her natural life, if she shall survive her said "husband as aforesaid."

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The only farther legacies given by the will were, at the close of it, 20 guineas each to his trustees, and a few other small legacies ; and he gave the residue to his son *Thomas*, and appointed him executor. The testator, by a codicil, dated the 22d *November*, 1797, reciting, that he had by his will given to his three daughters, *Sarah Bonner*, *Ann Bonner*, and *Maria Grace Bonner*, the sum of 1,200*l.* each, as therein mentioned, proceeded thus:

1807.

Bonner v. Bonner.

"And whereas since the making of my said will, on "more attentive consideration, it appears to me, that the "said legacies so given to my said daughters are not *ade-
*382 "quate provisions to support them in that state of life, to "which, from my possessions, they are entitled. Now, "therefore, I do hereby give and bequeath to my said "three daughters, the sum of 800*l.* each, in addition to "the said legacies given them respectively by my said "will, to be paid them respectively within six months "next after my decease, with interest at 4 *per cent.* from "the time of my death. And I do order and direct, that "this codicil or writing shall be taken and considered as "part of my will."

The codicil not being attested, the question upon the bill of *Sarah Bonner* and *Maria Grace Bonner*, who had attained the age of 21, was, whether the legacies given by the codicil, were charged upon the real estate, the personal estate being insufficient.

The *Solicitor-General* and Mr. *Roupell*, for the plaintiffs, and Mr. *Wear*, for the testator's third daughter, a defendant, mentioned *Hannis* v. *Packer*,(a) and that class of cases; contending, that in the construction of the trust of the term, the "legacies hereinafter bequeathed," must be taken to mean, in the whole will, taken together, including the codicil, which is part of the will, making the will speak at the subsequent date, the intention being to incorporate the legacies of 800*l.* with the former legacies; stating, that the latter were given in addition, upon an attentive consideration of the will conceiving the former legacies not an adequate provision.

(a) *Amb* 556.

Mr. *Richards* and Mr. *Bell*, for the devisees, defendants, admitting that a charge of legacies, generally, would include legacies given by a subsequent instrument,

*unattested, according to the cases referred to in *Habergham v. Vincent*,(a) insisted that the legacies added by this codicil, were not charged; that the charge of the legacies "hereby given," must be understood, already given; and the subsequent words, "hereinafter bequeathed," must be intended, bequeathed by the same instrument, which gives some farther legacies.

1807. Bonner v Bonner.

(a) *Ante*, vol. 2 p 204. See page 236. See *Rose* v. *Conyngham*, ante, vol. 12. p. 29.

The Lord CHANCELLOR.

The construction, that I am obliged to adopt, is very unfortunate. But I cannot make the declaration prayed by this bill, that the legacies, bequeathed by the unattested codicil, are charged upon the real estate. This is not a general charge of legacies, as *Hannis* v. *Packer*.(b) I can only marshal the assets, as Sir *Joseph Jekyll* did in *Masters* v. *Masters*.(c)

*February* 27.

(b) *Amb* 556.

(c) 1 *P Wms*. 421.



CLARKE *against* BYNE.

*February* 23. *March* 2

The rule, that a tenant cannot compel his landlord to interplead does not prevail, where the claim of a third person arises by the act of the landlord subsequent to the commencement of the relation of landlord and tenant.

THE bill stated, that *Henry Byne*, the elder, by indenture, dated the 20th of *December*, 1790, demised a field for 21 years to the plaintiff, at the annual rent of 8*l*. who paid the rent to him until *Michaelmas*, 1796, when he ceased to receive or claim the rent; and it was claimed and demanded of the plaintiff in his own right by *Henry Byne*, the younger, under *some deed or agreement, between him and *Byne* the elder, since the plaintiff's lease, by which deed or agreement as plaintiffs understand, *Byne*, the elder, gave up the rents and profits of the said premises, with others, and *Byne*, the younger, was put into the receipt of such rents and profits, and thereupon the plaintiffs, having received no notice to the contrary, or

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1807.
Clarke v. Byne.

any counter-claim of their rent from *Byne*, the elder, attorned to *Byne*, the younger, and paid him the rent from 1796, to the end of 1802, without interruption.

The bill farther stated, that in 1802, or the beginning of 1803, the plaintiffs were served with a notice in writing, signed by *Edmund Lodge*, as trustee for *Byne*, the elder, stating, that by indentures of lease and release, dated the 16th and 17th of *September*, 1796, executed by *Byne*, the elder, and *Byne*, the younger, their estates were vested in trustees, for the purpose of raising certain charges, agreed to be borne equally between them; and that *Byne*, the younger, had refused to pay his moiety; and therefore warning the plaintiffs not to pay him the rent, and the plaintiffs finding, upon inquiry of a solicitor, that there had been such conveyance, withheld their rent. An arrear of three years and a half being due, both the *Bynes* threatening to distrain, and, *Byne* the younger, having brought an action, the bill was filed against the *Bynes*, praying that they may interplead, offering to bring the rent into Court, and praying an injunction.

The defendant, *Byne*, the younger, put in a demurrer, both to the discovery and relief; for cause, 1st. That according to the bill, neither *Byne*, the elder, nor *Byne*, the younger, have any title to the rent; and, therefore, they
* 385 are not the persons to interplead in respect thereof; 2dly. That according to the *bill the legal estate is vested in, and the rent ought to be received by trustees; who are not parties.

Mr. *Bell*, in support of the demurrer.

As in a Court of Law, a tenant is not permitted to dispute his landlord's title, so neither is it allowed in equity, even by a bill of interpleader; and for the best reason; many titles perfectly fair and *bona fide*, being founded in possession only; no one looking beyond 60 years. The
(a) Mitf. 48. general doctrine is stated by Lord *Redesdale*, (a) and is

very strongly laid down, with reference to this particular point, in *Dungey* v. *Angove* (*b*) The case of *Cowtan* v. *Williams*(*c*) is a case of exception; the question being raised by the act of the lessor; which the tenant cannot possibly dispose of; as, where the lessor grants annuities to different persons, all claiming upon the tenant; those are incumbrances, created by the act of the lessor, with which the tenant has nothing to do. This case is not within the exception, being merely the case of a tenant, calling upon his landlord, to whom he has attorned, and paid rent, to contest the point, whether he has such an estate as entitles him to the rent; suggesting, that he has no title, upon the information of another person.

(*b*) *Ante*, vol. 2. p. 304.
(*c*) *Ante*, vol. 9. p. 107.

The *Solicitor-General* and Mr. *Giffin Wilson*, for the plaintiff, insisted, that this case is precisely within the principle of *Cowtan* v. *Williams*; a landlord by an act, subsequent to the demise, giving title to another person; the tenant by that act placed in this situation, that both parties may distrain upon him; having no defence at *law against the one, from whom he accepted the lease, nor against the other, to whom he has attorned, and paid rent. The difficulty as to the trustees arises also from the act of the landlord. When the answer comes in, it will appear whether the trustees have any interest. * 386

The Lord CHANCELLOR.

The doctrine of *Dungey* v. *Angove* is sound. Certainly a tenant cannot make his landlord interplead with a stranger, setting up a demand. But what is this case? From 1796, to 1802, the rent was never demanded by *Byne*, the elder, the original lessor; and under a deed, *Byne*, the younger, was let into possession, and received the rents. This is precisely the case of *Cowtan* v. *Williams*, upon the very same principle. This tenant does not come to disaf-

1807.

Clarke v. Byne.

firm the act of his landlord. The attornment was not by fraud, but under a title, derived from *Byne*, the elder, to *Byne*, the younger, subsequent to the date of the plaintiff's lease. The title of the trustees, is also a title, proceeding from *Byne*, the elder, creating additional embarrassment. It may be necessary to amend the bill, either by making the trustees parties, or striking them out altogether; but as between *Byne*, the elder, and *Byne*, the younger, this is a complete case of interpleader.

The demurrer must therefore be overruled.



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*Feb.* 28

*March* 5.

## *LORD SHIPBROOKE *against* LORD HINCHINGBROOK.

The Court refused upon petition or motion to prosecute an inquiry, directed by a decree many years ago, but never pursued; the party applying being born some years after the decree; only two months old at the date of the general report, and made a party some years afterwards, but several years before the application.

A PETITION, presented in this cause, stated the will of the Earl of *Halifax*, dated the 27th of *August* 1770, devising his estates, in the Counties of *Northampton* and *Buckingham*, upon trust, to pay the rents to Lord *Hinchingbrook* until the testator's grandson, the late defendant, *John George Montague*, should attain 21; and then to convey to the use of him and his first and other sons in tail-male, with remainders over; and devising the testator's estates in the County of *Durham* to the same trustees, in trust to sell, and pay his debts and legacies, and to invest the surplus in the purchase of freehold estates in the County of *Sussex*, to be settled to the same uses as his *Sussex* estates; and he gave his *Sussex* estates to the same trustees, upon trust, after *Anne Maria Montague* should attain 21, to convey to her for her life, with remainders to her first and other sons and daughters successively in tail-male, with remainders over.

1807.

Lord Shipbrooke v. Lord Hinchingbrooke.

By a codicil, dated the 6th of *June*, 1771, the testator directed, that, if the property, bequeathed for his debts, &c. should not be sufficient, the deficiency should be made good out of his *Northampton*, *Buckingham*, and *Sussex* estates: one moiety by the *Northampton* and *Buckingham* estates, the other by the *Sussex* estate; and he charged those estates with the deficiency accordingly.

The testator died in 1771, and, upon his death Lord *Hinchingbrook* took possession of *Horton* house, part of the *Northampton* estate; and continued in possession until 1781. *John George Montague* attained the age of 21 after the sale of the *Northamptonshire* estate; and died without issue male. *Anne Maria Montague*, having *attained the age of 21, married *Richard Archdall*; and died in *September*, 1805, having appointed her husband her executor. The petitioner, *Richard Archdall*, the younger, is the eldest son and heir male of that marriage; and being born on the 7th of *September*, 1783, attained the age of 21 on the 7th of *September*, 1804. *388

The petition farther stated a decree pronounced upon the 15th of *July*, 1772, establishing the will, and giving the necessary directions; the Master's report, that he had sold the *Durham* estate; and stating a very large deficiency for the debts, &c. after application of the personal estate, the purchase money of the *Durham* estate, and the rents of the *Durham* and *Sussex* estates: the rents of the *Northampton* estates not proving sufficient for the incumbrances upon those estates; and, that by an order, made on farther directions, on the 18th of *December*, 1778, it was ordered, that the estates of *Northampton* and *Buckingham* should be sold; and in case of a deficiency for the debts, &c. it should be raised by sale or mortgage of the *Sussex* estate; and that the Master should inquire, whether the then plaintiffs, the trustees, had made any, and what rent of the mansion-house and premises at *Horton*, and whether the same

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had been in the occupation of any person, and whom; and in case the Master should find the premises to have been occupied, he was to set a value on such occupation, by way of rent; and that what should be coming on such value should be applied in like manner as the rents and profits of the other part of the *Northamptonshire* estate was directed by the decree: viz. in aid of the personal estate, and the produce of the sale of the *Durham* estate to the debts, &c.—reserving the consideration, how the deficiency, if any, should be raised. Upon the 2d of *March*, 1782, a separate report was made, stating the debts.

* 389 *The Master made his general report, dated the 24th of *November*, 1783, stating the sale of the *Northampton* and *Sussex* estates: the *Buckingham* estate having been settled upon the marriage of the testator's daughter, with the defendant, Lord *Hinchingbrook*, then Lord *Sandwich*, and that the rents and profits of the *Nottingham* estate were insufficient to satisfy the payments, directed thereout by the will, by the sum of 3,145*l.* 15*s.* 9 1-2*d.*

The petition farther stated, that at that time the petitioner was of the age of 2 months and 17 days; and that he ought, before the making of that report, to have been made a party to the cause by supplemental bill; and that, not having been made a party till several years afterwards, he as well by reason thereof, as of his infancy at the date of the report, is not bound by any thing contained in the report, and is necessarily not bound by any omission or neglect in making such report; that in that report the Master has omitted all notice of the direction in the order of the 18th of *December*, 1778, directing an inquiry, whether the plaintiffs had made any and what rent of the mansion-house at *Horton*, &c.; that notwithstanding that order Lord *Hinchingbrook* continued in possession of those premises, of the yearly value of 301*l.* 12*s.* 9*d.*

1807.

Lord Shipbrooke v. Lord Hinchingbrook.

The original plaintiffs being all dead, a bill of revivor and supplement was filed against all the then defendants, and also against the petitioner, as eldest son and heir male of the late defendant, *Anne Maria Archdall;* and by a decree, dated the 29th of *July*, 1789, it was ordered, that the former decree, orders and proceedings, should be carried on, and the accounts thereby directed, should be prosecuted against the present *parties in like manner as thereby directed against the then parties. * 390

The petition then, after detailing the subsequent reports and proceedings in the cause, stated, that all the proceedings since the 7th of *September*, 1803, the day of the petitioner's birth, except the order of 1805, directing inquiries, took place during his infancy; and therefore he is not to be prejudiced by any want of form, neglect, or omission, in the proceedings; that the petitioner, having become entitled upon the death of his mother, on the 16th of *September*, 1805, to the *Sussex* estate, as tenant in tail-male in possession, and in that character to the residue of the money arising from the sale of the said estates, after payment of the debts and legacies, which had been invested in the 3 *per cent.* bank annuities, obtained an order for a transfer to him under the act(*a*) for the relief of persons entitled to entailed estates, to be purchased with trust money; and that after he became so entitled, and since he attained 21, he discovered that the inquiry under the order of the 18th *December*, 1778, had not been prosecuted; that 17,000*l.* had been paid out of the purchase money for the *Sussex* estate, to satisfy the deficiency of the money produced by the *Northamptonshire* estate, in satisfying the proportion of the debts charged on that estate; and the whole of the legacies, and of the costs, with a small exception, had been paid out of the purchase money of the *Sussex* estate; and that 3,000*l.* was due in respect of the occupation of *Horton* house, &c. by Lord *Hinchingbrook*, which the petitioner was entitled to receive, towards reimbursing him the pay-

(*a*) Stat 40. Geo.III. c. 56.

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Lord Shipbrooke v. Lord Hinchingbrook.

ments from the *Sussex* purchase to answer *the deficiency of the purchase money of the *Northampton* estate.

The petition farther stated, that the Master, having declined to proceed on the inquiry under the order of 1778, the petitioner applied, by motion, on the last seal after *Michaelmas* term, 1806, which motion was opposed by Lord *Sandwich*, on two grounds: 1st. That after the omission in the report, following the order and the length of time, it was against the practice of the Court to allow such an inquiry to be now prosecuted. 2dly. That the inquiry either had been, or must be presumed to have been waived; and the Lord Chancellor having intimated an opinion that the petitioner's claim might be made by original bill, refused the motion.

The petition therefore prayed, that the Master may be at liberty to prosecute the inquiry, directed by the order of the 18th of *December*, 1778.

The *Attorney-General* and Mr. *Alexander*, in support of the petition, insisted that the petitioner might obtain relief upon petition, without the expense, inconvenience, and delay of a suit; desiring not to impugn or oppose any decree or order, but to carry the decrees and orders of the Court into execution. A petition is the proper mode of carrying into execution decrees and orders of the Court against the persons who were parties to the suit at the time such decrees and orders were pronounced. The object of a petition may be, not only to carry a decree into execution, but even to vary it, as a petition of rehearing, which differs from other petitions only in requiring the signature of counsel, with a view to prevent frivolous applications. In
* 392 this instance the person, against whom *the execution of this decree is prayed, has by the petition as full notice of the relief sought against him, as he could have by a bill, an equal opportunity of making his defence, and is even placed in more favourable circumstances, as he may state

whatever defence he has by affidavit. There is no rule, precluding the Master from prosecuting inquiries, directed by any decrees or orders, after the report under such decrees or orders has been made; and though the direction by the original decree for an account of the rents and profits of the testator's estates was answered by the first report, stating that the Master had taken those accounts, the Master has in his second report, without any new direction, but under the order in the original decree, proceeded to take a farther account of those rents and profits. There is no waiver; but supposing a waiver by any of the parties adult, the petitioner not having been a party at the date of the report, of the 24th of *November*, 1783, though he was then in existence, and was a necessary party, cannot be bound by any effect of such report with reference to those who were then parties; and having been an infant during all the proceedings that followed that report, is still entitled to the benefit of this inquiry. All parties interested in the inquiry being now before the Court, capable of making their defence by affidavit, and the proceedings in the Master's office, this is not a proper case for an original bill; which from the number of parties, and the great length of the proceedings, which it would be necessary to state, would be attended with enormous expense.

The *Solicitor-General* and Mr. *Leach* opposed the petition; contending, first, that this application was decided by the refusal of the motion; as every thing that can be done by petition may be done by motion, *the other course being adopted only as more convenient, the ground appearing to the Court upon the petition, and not by the allegation of counsel only. They insisted, that after the general report under a decree, the Master could not prosecute a particular inquiry, directed by the decree; and that if a person is aggrieved by proceedings in a cause in which he is not a party, the only mode of proceeding is an original bill, in the name of a supplemental bill; and they referred to *Lloyd* v. *Johnes*. (a) * 393

(a) *Ante*, vol. 9. p. 37

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The *Attorney-General*, in reply, observed, that no fresh right was communicated here: nor any thing new to be stated. In *Lloyd* v. *Johnes* it was necessary to state the new right coming in. This is a petition merely to carry a decree into execution,

The Lord CHANCELLOR.

*March* 5.

Distinction between motion and petition, as applied to carry into effect decrees and orders.

I do not find, that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the Court to grant or to refuse them, according to circumstances. But, generally speaking, motions, which have for their object to give effect to decrees and orders, should be confined to cases where the order, which is to be made upon the motion, arises out of recent proceedings, concerning which there is no doubt. For, as the adverse party knows nothing but by the notice, containing only the name of the cause, and what is prayed of the Court, the proceedings ought to be recent and notorious so as that the adverse party may be supposed *to be perfectly conusant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in a petition. On this principle, it is admitted, that I did right in refusing to make any order on the motion.

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What cases are of this sort, and what may require the formality of a petition, reciting all the proceedings in a cause, is a matter obvious enough in the application of the principle; but it is still a matter of discretion. Lord *Eldon*, it is said by Mr. *Alexander*, would not allow money to be paid out of Court upon motion; as the recitals in a petition, which must be justified by the proceedings to warrant the drawing up of the order, would always speak for themselves at any distance of time, or change of parties in the cause. A petition upon this principle is the proper form of proceeding to give effect to a decree of long standing by a party to the cause, entitled to the benefit of it; but by

Money not paid out of Court on motion.

this proceeding a decree can neither be added to, nor altered. To add any thing to a decree, the consequence of any proceeding, which the decree had directed, the cause must be set down for farther directions. To alter the decree itself in the minutest particular, the cause must be reheard.

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No addition to, or alteration in a decree, by motion or petition.

The petitioner, *Archdall's* counsel, admit this; and say, that they do not seek by this petition to add to the decree, or to any order made under it, or to annul any proceeding which has been had; but that by an order, made on the hearing of the cause for farther directions, in 1778, the Master, among other things, was directed to inquire, whether the plaintiffs had made any and what rent of the Manor house of *Horton*, and whether the same had been in the occupation of any body, and whom, and he was directed to set a *value on such occupation by way of rent; that in pursuance of this order, the Master made his general report, on the 24th of *November*, 1783, the petitioner being only two months old, wholly omitting this inquiry, and that several other proceedings were had during his infancy without correcting this omission; he being besides not a party to the cause, until he was made so by supplemental bill in 1789, and not coming of age till 1805; and, therefore, the counsel for the petitioner say, that they do not seek to alter or disturb any of the proceedings; but only that the Master should now make an inquiry, expressly directed by the decree; which, it appears by all the subsequent proceedings in the cause, has not been carried into effect; that the right therefore is clear; and that the formal remedy is by petition.

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To this statement I answer, that if the right was clear, and the petitioner was entitled as of course to the remedy he seeks, I should consider a petition to be the proper form for obtaining it. Nor do I mean to say, that, if I were to entertain the petition, and ultimately to order according to the prayer of it, and what I ordered was in substance right, any appeal could be supported on the

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ground, that the thing was improperly done by petition, and not by bill. But I consider, that according to the nature and difficulty of the case, the Court has a discretion to refuse to enter upon it, except by a bill regularly filed.

The infant was not in existence when the decree was made in 1772, nor at the date of the order in 1778, the non-execution of which is the foundation of the petition. The Court had before it all the proper parties to the suit, the infant's title coming in between his parents and persons entitled in remainder, by his *subsequent birth in
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1783; and although I do not mean to say, that the rights of the inheritance are bound by the acts or laches of tenants for life, as they are by the acts or laches of tenants in tail, yet, on the other hand, it is an alarming proposition, that there can be no *quietus* for any person, absolved from any duty or obligation by a proceeding in a cause, that has all legal parties to it, until by the course of nature and human events, no person, not then existing, can possibly come into the world with rights, not concluded by the parties to the suit.

This might go on more than half a century, in many cases. Suppose Lord *Hinchingbrook*, now Lord *Sandwich*, were dead before this petition, or any thoughts of this petition, what means of defence would belong to those who represent him?

As Mr. and Mrs. *Archdall* had a direct interest to insist on the charge on Lord *Hinchingbrook*, the reasonable presumption is, that they had reason for not enforcing it. The money might have been paid, or the improvements might have swallowed up the rent, and made him a creditor, not a debtor; or he might have taken possession with the consent of all parties, under an engagement not to be charged with rent. The infant besides was made a party in 1789, and it is admitted, that an infant suitor is bound by

Infant suitor bound by laches

laches in the suit. It was equally open to him then as now. I do not however go upon that, but upon the effect of the length of time, in a case so circumstanced.

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Lord Shipbrooke v. Lord Hinchingbrook.

It is upon these principles that Courts of Law will not maintain the clearest rights, though not barred by statutes of limitation, after a length of time, analogous *to the requisitions of such statutes. Human affairs call aloud for such principles in the administration of justice. I do not mean to say, that they may be found to have any just application to this case; but a bill is the proper mode to try that question. When the bill is filed, the adverse party may demur to it; or plead to it. He may by those modes resist the account to be taken under such disadvantages. It is said, that the affidavits might furnish the same lights. They might in every case. The forms of the Court are ancient forms; which the wisdom of ages has established, and by which I am bound.

Effect of length of time at law by analogy to the statutes of limitation.

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Therefore, I think, the right of the petitioner, as it is connected with the time, and the forms of the Court, is not of a kind to be best discussed upon a petition; and although (as I have said) I do not think, that any technical objection could strictly be taken to this mode of proceeding, yet it is in the exercise of the Court's discretion is a fitter subject of a bill.

1807



ROLLS.

1806, *July* 2.
1807, *February* 3

Bill by one of the officers and crew of a privateer against the owners for an account of captures, according to the articles. Leave given to amend, by stating, that the bill was on behalf of the plaintiff and all others, and upon that amendment the account was decreed

## GOOD *against* BLEWITT.

THIS bill was filed by the captain of a privateer, named *The Happy Return*, against the owners for an account, according to the articles, that had been executed for a distribution of the prizes made by that ship.

Mr. *Fonblanque* and Mr. *Hall*, for the defendants, took an objection for want of parties, insisting, upon *the authority of *Moffatt* v. *Farquharson*,(a) that all persons interested must be parties, as was held in that case, though the bill was filed by the plaintiff on behalf of himself and all the others.

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Mr. *Richards* and Mr. *Wetherell*, for the plaintiff, said, in *Adair* v. *The New River Company*,(b) it was held not necessary, that all persons interested should be parties, admitting, that the bill in that cause stated that there was a great number of persons interested, and it was impossible to bring them before the Court; the bill in this cause having no such allegation, merely stating, that the articles were signed by a great number of persons.

The MASTER of the ROLLS observed, that this was the case of a plaintiff, instituting his own suit for his own interest; that Lord *Hardwicke* had certainly laid down that all must be parties; but the question was, whether that had been departed from.

Leave was given to amend, by introducing a statement, that the bill was on behalf of the plaintiff, and all other the mariners and persons, who had signed the articles, and had not received their shares of the prizes.

*February* 7. The bill was amended accordingly. The prayer of the amended bill, was an account of the shares due to the

(a) 2 *Bro C. C.* 338.

(b) *Ante*, vol. 11. p 429. See *Lloyd* v *Loaring*, *ante*, vol 6. p. 773. *Pearson* v. *Belcher*, *ante*, vol. 4 p. 628.

plaintiff, as captain, and all other the unsatisfied *mariners and persons, entitled under the articles; and that a distribution may be made. 1807.

Good v. Blewitt.

Mr. *Fonblanque*, and Mr. *Hall*, again objected, contending, that the bill in its amended form, as a bill on behalf of the captain and others, interested under the articles, could not be sustained. They compared this to the cases of part owners of a ship, and other partnerships, in which all the owners or partners must be either plaintiffs or defendants. In a bill for a residue all the residuary legatees must be parties; and generally in all cases, where several persons have a same title, as jointly interested in the same subject, they must all be parties. This rule is absolutely necessary, in order to protect the person, against whom the account is sought, from being exposed to many suits, to have the same account taken by other persons, having the same right. The only two cases, in which bills of this kind are permitted, are those by creditors and legatees; but these are necessary on account of the situation and duties of an executor, and the peculiar nature of his trust; and the established practice of the Court is framed with this view. If a creditor will not come in before the Master, the Court restrains him from suing the executor at law. But in this instance, what is to prevent the rest of the mariners from bringing actions against the defendant for their shares? This bill is in truth nothing but a bill by the captain for his share, for which he ought to bring an action.

Mr. *Richards* and Mr. *Wetherell*, for the plaintiff.

The general rule is clear: but it will be found, that the cases of bills by legatees and creditors, are by no means the only exception to it; and it would be singular, if the exception should be permitted in those bills *alone, and refused on other occasions, where the same, or even a * 400

1807. Godd v. Blsett

greater necessity for it may exist. Upon this ground it never was doubted, that a bill will hold by some tenants or copyholders of a Manor, or by some inhabitants of a parish, on behalf of themselves, and all others interested, to establish the custom of a Manor, a right of common, fishery, &c. Bills of this kind are not unfrequently seen upon this very point of prize money: there is a case of Leigh v. Thomas,(a) where the objection was taken, that the bill was not on behalf of the crew generally, and it seems consequently to be allowed, that a bill in that form would have done. But the case of *Chancey* v. *May*,(b) is a decision quite in point. There a bill was brought by the treasurer and proprietors of a numerous subscription company, on behalf of themselves and all other proprietors against their late treasurer for an account; and the objection, now insisted upon, was taken, and overruled; as it would be impracticable to make all persons parties by name; and the continual abatements would defeat the ends of justice. Another authority of the same kind, is a late case of *Ansell* v. *Esdaile*, in the exchequer, which was a bill against treasurers of a Tontine Club, by some members, on behalf of themselves, and all the rest, for an account and distribution.

(a) 2 Ves 312

(b) Prec Ch by Mr Finch, 592.

These are instances of exceptions from the rule, requiring to be on the record as plaintiffs all parties interested in the right to be established. But in some cases the exception is permitted with respect to defendants; where the rights of those, who are not made defendants, may be bound, or at least affected, as *in *Adair* v. *The New River Company*,(a) so in *Cuthbert* v. *Westwood*,(b) where it is laid down, that in a bill to establish payment in lieu of tithes against the land-owners it is not necessary to make the occupiers defendants, on account of their number; and in the case of *Biscoe* v. *The Undertakers of the Land Bank*(c) a bill, calling upon 16 of 250 subscribers, to make good to the plaintiff their proportions of his loss, was entertained.

* 401

(a) Ante, vol. 11 p. 429.

(b) Gilbert's Rep. 230.

(c) 2 Eq Ca. Ab. 166. pl. 7.

The present case obviously falls within the necessity of the exception. If a prize agent cannot be made to account unless all the crew of a ship are parties on the record, it may fairly be said, that he can never be brought to an account in a Court of Equity.

1807.
Good v Blewitt.

The MASTER of the ROLLS.

I have considered this point. There is a strong resemblance between this case and that of *Chancey* v. *May*. In both cases a great number of persons associated together for the purpose of the adventure, under the agreement, common to all. In *Chancey* v. *May*, the other persons could not possibly have been made parties; and the rule was dispensed with. If this is to be in any case permitted, no case can call more strongly for the indulgence, than where a number of seamen have interests; for their situation at any period, how many were living at any given time, how many are dead, and who are entitled to representation, cannot be ascertained. This is a case, therefore, that calls peculiarly for that indulgence. It is not a case, where a great number of persons, who ought to be defendants, are not brought before the Court, but *are to be bound by a decree against a few. These persons have interests as plaintiffs, and there is no greater inconvenience than in the ordinary case of a plaintiff, suing on behalf of himself and all others. If the inconvenience should arise of such a claim being brought by any person for his share, the Court would have the same power of redressing it as it exercises for the protection of an executor. * 402

The decree was made accordingly.

1807.

Rolls
*March* 25.

Interest against executors, for balances in their hands, with costs, upon the circumstances; not of course, merely as charged with interest.

## ASHBURNHAM *against* THOMPSON.

A CLAIM of interest and costs was made against executors, under the circumstances appearing on the Master's report, that they had in their hands for 20 years large balances, upon an average above 1,000*l.* and that they settled the account of an agent of the testator, including an allowance of commission at 5*l.* *per cent.* though no such charge had been made during the life of the testator. A sum of 600*l.* also appeared by the report to be the profit upon stock transactions. The will directed the property to be laid out in the funds, in trust, for the plaintiffs. The executors by their answer represented, that they kept the trust-money at their banker's to a separate account.

Mr. *Fonblanque*, Mr. *Trower*, and Mr. *Maddocks*, for the plaintiffs.

Executors, keeping money at their banker's, though placed to a separate account, are liable to interest; being
* 403
under their controul, and increasing their credit *at their banker's. Their line of duty is marked out by the will, to lay out the property in the funds for the benefit of the plaintiffs. The other legacies being very inconsiderable, and the dividends of the property in the funds sufficient for maintenance, there is no reason for keeping these balances in their hands; nor is any reason pretended. They say merely, that they kept the money in their banker's hands, which is never admitted as an excuse; *Hilliard's* case.(*a*) *Younge* v. *Combe.*(*b*) *Piety* v. *Stace.*(*c*) *Longmore* v. *Broom.*(*d*) If they make no interest, they shall be charged with interest at the rate of the Court; if they have made interest, or a greater profit, they shall be charged accordingly. *Rocke* v. *Hart.*(*e*)

(*a*) *Ante*, vol 1. p. 89.
(*b*) *Ante*, vol 4. p. 101.
(*c*) *Ante*, vol 4. p. 620.
(*d*) *Ante*, vol. 7. p. 124.

(*e*) *Ante*, vol 11. p. 58. *Mosley* v. *Ward*, *ante*, vol. 11. p. 581. *Bate* v. *Scales*, *ante*, vol 12. p. 402.

1807.

Ashburnham v. Thompson.

The account should be taken with rests, with a view to compound interest, according to *Raphael* v. *Boehm*.(*f*)

As to the charge of commission, in a late case,(*g*) a claim of commission by Sir *Stephen Lushington*, was disallowed by Lord *Eldon*, on the ground, that no charge had been made during the testator's life.

This is also plainly a case for costs, according to *Seers* v. *Hind*.(*h*) The executors investing money in stock, transferring stock into their own names, and trafficking with it, cannot represent that they were not guilty of a breach of trust.

(*f*) *Ante*, vol. 11 p. 92. Post, 407.

(*g*) See *Bruere* v. *Pemberton*, *ante*, vol. 12 p. 386

(*h*) *Ante*, vol. 1. p. 294.

*Mr. *Richards* and Mr. *Thomson*, for the defendants, admitted that the executors must pay interest for the balances in their hands, according to the regular course; but observed that the habit of the Court is not to charge compound interest; and the case of *Raphael* v. *Boehm* was a case of very special circumstances, upon a will containing very particular directions for accumulation. * 404

The Master of the Rolls pronounced the decree, with costs, against the defendants, but went into the circumstances, as a ground for it; observing, that he did so, seeing the rule laid down in *Seers* v. *Hind*,(*a*) in that general manner; that where interest is given against executors for a breach of trust, costs should follow of course; a proposition to which he was not quite prepared to accede, as there may be many cases in which executors must pay interest, which would not be cases for costs.

(*a*) *Ante*, vol. 1 p. 294. *Mosley* v. *Ward*, *ante*, vol. 11. p. 581.

1807.

ROLLS.
March 6.

## SHEE against HALE.

Bequest of an annuity, with condition to fall into the residue upon signing an instrument, agreeing to sell, assign, charge, or dispose of, or empower any person to receive, &c. in the most comprehensive terms.
The condition broken by taking the benefit of an insolvent act.

*JOHN MOOTHAM*, by his will, dated in *March*, 1803, gave and bequeathed all the residue of his real and personal estate to trustees, upon trust, to *pay to his son, *John Mootham*, the yearly sum of 200*l.* clear of all deductions, during the term of his natural life, or until such time as his said son should actually sign any instrument, whereby, or in which he should contract or agree to sell, assign, or otherwise part with the same, or any part thereof, or in any way charge the same, or any part thereof, as a security for any sum or sums of money, to be advanced or lent to him by any person or persons whomsoever, or in any other manner whatever charge or dispose of such annuity, or any part thereof, by anticipation, or whereby, or in which he should authorise or empower, or intend to authorise or empower any person or persons whomsoever to receive such annuity, or any part thereof, except only as to the then next quarterly payment, after such authority or power should be given: such annuity or annual sum to be paid to his son, *John Mootham*, by four equal quarterly payments; and he declared his will to be, that in case his said son should at any time sign or execute any such instrument or writing for the purpose, or for any of the purposes aforesaid, (except as aforesaid,) then and from thenceforth the same, and every part thereof, should cease to be paid or payable to him, and should sink into the general residue of his personal estate.

* 405

By a codicil, dated the 27th of *December*, 1803, the testator bequeathed the residue of his estate and effects to the same trustees, upon trust, to pay the interest and produce thereof unto his wife, *Elizabeth*, during her life, and after her decease, directed them to transfer such residuary personal estate to other persons.

1807. Shee v. Hale. *406

The testator died on the 6th of *July*, 1804. *John Mootham*, the son, being in confinement for debt, took *the benefit of an insolvent act, passed on the 30th *July*, 1804, and the annuity of 200*l.* under the will of his father, was inserted in the schedule of his property delivered in, and signed by him.

The bill was filed by the assignees under the insolvent act, claiming the annuity. The answers raised the question, whether the annuity was forfeited and sunk into the residue.

(*a*)Mr. *Richards* and Mr. *Roupell*, for the plaintiffs; and Mr. *Fonblanque* and Mr. *W. Agar*, for the defendant, *Mootham*, contended, that *Mootham*, the son, had not done any act that could incur a forfeiture, which is to be construed strictly; and in this will an act of the party is intended, not an act of law.

(*a*) The arguments and judgment, *ex relatione*.

Mr. *Thomson* and Mr. *Benyon*, for the residuary legatees.

This is a plain case of forfeiture under the words of this will, which are very comprehensive, speaking of any instrument whereby he shall authorise or empower, or intend to authorise or empower any person to receive the annuity. It is by his own act that he is to have the benefit of this insolvent act. He cannot be discharged, unless he signs schedules, and gives notices, &c. This act is purely for the benefit of the debtor: not compulsory, as a commission of bankruptcy, or the clause in the Lords' Act; but the debtor has an option whether he will take the benefit of it. No one can doubt his intention, when he signed the petition and schedule. He has therefore done acts by which the annuity is forfeited.

1807.

Shee v. Hale.

*The MASTER of the ROLLS.

The intention of the testator to make this annuity personal to his son, cannot be doubted. The question is, whether that intention is sufficiently expressed. He has gone awkwardly about it, by expressing particular acts. His son was not to have this as a fund of credit. The testator supposed he had sufficiently guarded against that. It appears to me, that the son has done an act within this will, to authorise or empower others to receive this annuity. This differs from the case of the bankrupt. The bankrupt had not done any thing. The insolvent debtor was not in a situation to be compelled to part with this annuity. He might have enjoyed it for his life. The signing the petition and schedule appear to me to be clear acts. As to the intention there can be no doubt.

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## RAPHAEL *against* BOEHM.

*March* 9, 10

Executor directed not to derive any advantage from keeping money in his hands, without accounting for legal interest, and to accumulate for the *cestui que trust*

Decree directing a computation of interest at 5*l per cent* on all sums received by him, while in his hands, "and that the Master do in such computation make half-yearly rests"

The object of that direction is to charge compound interest, and the decree, though perhaps going farther than usual, was held under the circumstances, the executor having kept the whole property in his hands, properly executed by a computation of interest upon each receipt from the day it was received, the balance of receipts, with the interest so calculated, and payments, being struck at the end of the half year, and that balance, so composed of principal and interest, being carried forward as an item in the account, producing interest. Affirmed on rehearing.

THIS cause came on upon a petition, presented by the defendant, to rehear the decree,(a) pronounced *by Lord *Rosslyn*, upon the 26th of *July*, 1798.

Mr. *Perceval*, Mr. *Hart*, and Mr. *Mitford*, for the defendant, in support of the petition.

(a) See the former report, *ante*, vol 11 p. 92

1807.

Raphael v. Boehm.

This decree, directing the account with interest at 5*l.* *per cent.* upon all sums of money from the respective times, at which they were in the hands of this executor, and with half yearly rests, proceeds upon an erroneous principle. There is no instance of charging an executor in this manner, upon the principle of compound interest, even when the Court has been disposed to act vindictively against him, for which there is no ground in this instance. Even in that case the Court does not call upon the executor to pay more interest than he did or could make. *Waring* v. *Cunliffe.*(a) *Nightingale* v. *Lawson.*(b) Unless the Court is bound by the particular directions of the will, the account must be taken in the ordinary course, at 4*l.* *per cent.* and without rests. The direction of this will is, that he shall account, with legal interest, which expression must have reference to the character of the person who is to account. If this executor had laid out the money in the funds, the capital would have been less by above 7,000*l.* than it is, according to the manner in which he has accounted. Lord *Eldon* intimated his opinion, that this decree had gone farther than usual, and expressed considerable doubt of its propriety.

(a) *Ante*, vol. 1. p. 99.
(b) 1 *Bro. C. C.* 440.

The *Solicitor-General*, Mr. *Richards*, and Mr. *Thomson*, in support of the decree.

This decree was made, not upon the general rule, but upon the particular circumstances, the special *directions of the will, and the conduct of this executor. The will has an express direction, that the executor shall have no benefit from the money in his hands, and that he shall make the interest accumulate for the benefit of the legatees. He might in the funds get a great deal more than 5*l.* *per cent.* His conduct as to the sums of 30,000*l.* and 12,000*l.* was, that the former was in his hands three years and an half, the latter two years and an half. The possible hazard must be considered. He might be a man of great

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1807. landed property, and yet the money might be lost. The
Court will not take into consideration the calculation, upon
Raphael v. Boehm. which it is represented, that the produce, if the property had been invested in the funds, would have been 7,000*l.* less. The Court will consider, what the gain might have been. *Waring* v. *Cunliffe*,(*a*) probably, was the common case, with no particular direction. As to what is said in *Nightingale* v. *Lawson*,(*b*) the direction to lay out interest in the funds may be complied with the next hour. The expression "legal interest," under the directions in this will, cannot be understood interest according to the course of this Court; which is adopted only, where no other rate is mentioned in the will, according to the usual expression in every decree. The difficulty of an immediate accumulation, in the case of real estate, is removed by this testator, pointing to the funds. Half-yearly rests are directed; as dividends are paid half-yearly, which might have been laid out immediately.

(*a*) *Ante*, vol. 1. p. 99.

(*b*) 1 *Bro. C. C.* 440.

Mr. *Perceval*, in reply.

It is plain, that Lord *Eldon* would not have taken so early a period, pointing at this, that a time should be fixed,
* 410 at which it might be said, the defendant had *money in his hands; a time, not actual, but supposed. Is an executor, liable to all the demands, not to have an allowance of any period, to look into his affairs; to see what sums he is to retain for the expenses, which he is bound to defray? In the first half year there are payments to the amount of 532*l.* farther payments in the next half year; and in a subsequent half year the payments exceed 1,900*l.* How are these payments to be made, if all the property is locked up? There are also regular payments for maintenance, actually allowed.

The Lord CHANCELLOR. 1807.

Raphael v. Boehm.

I agree with Lord *Rosslyn* in the general principle, upon which this decree is founded; and it is not easy to mistake the opinion of Lord *Eldon*, as far as I have collected it from those parts of the judgment that have been read. But I am not quite sure, whether some consideration is not required as to one part of the case. It is truly observed by the Solicitor-General, that this decree was not pronounced upon the general rule as to the duty of an executor, founded upon two principles: 1st. That in order not to deter persons from undertaking these offices, the Court is extremely liberal: 2dly. That care must be had to guard against abuse. There is no difficulty upon this will as to the duty of the person, acting under it as executor. The testator directs his funds to be administered according to the law of *England*, subject to the directions of his will. The legal rate of interest of the country I must take to be 5*l. per cent.* that which the law allows as the standard of interest. Accumulation of the surplus beyond the maintenance of each child is directed; and the testator had in view, for that purpose the government *funds. There is * 411
no doubt, that if the executor had immediately upon receiving property, particularly that large sum, invested it in the funds, to accumulate, according to the express direction, and the condition imposed by the will, he could not have been called upon to account at the rate of 5*l. per cent.* unless by the fluctuation of the funds, the produce had reached that amount; for he would have acted in the plain and direct execution of his trust. But these large sums were drawn out of a situation, where they were producing the legal interest required by the will; and yet it is contended, that he is not accountable for the legal interest, positively directed by the will to be the standard. The executor certainly never can be admitted to state that.

1807. Raphael v. Boehm.

I also agree, that this account ought to be decreed with rests. It is clear upon the report of this case, that Lord *Eldon* would have made the same decree, as to the rate of interest, at 5*l.* *per cent.* and with half-yearly rests; and upon this principle, in which I concur, that a trustee, directed to do an act, from which the *cestui que trust* will derive a particular advantage, not performing that trust, shall be charged precisely in the same manner as if he had performed it. Lord *Eldon* says, he shall not be permitted to go back, and account, as if he had invested the property according to his trust. Certainly a trustee cannot be permitted to speculate in that manner instead of performing his trust.

The difficulty I feel is upon this point, whether even upon the principle of this will, the executor was called upon immediately to pay in the whole of this sum of 30,000*l.* as if there was no trust to be performed; or, whether some
* 412 account should not be taken, and a *time fixed, from which the fund should be considered productive; which can be ascertained only by an account, determining what sums he might lawfully retain in the due execution of his trust.

The Lord CHANCELLOR.

*March* 10. I shall not make any alteration in this decree. I agree to every thing that appears in Lord *Eldon's* judgment; and have conversed with his Lordship, who says, if the cause had come originally before him, he should have found no difficulty in making the decree according to the substance and justice of the case; and upon this clear principle, in which I perfectly concur, that the duty of this executor does not depend upon the general rule, as it relates generally to administration of assets, but upon the special rule prescribed by *this particular will; by which accumulation is directed, the particular mode of accumulation is pointed out, and the executor is told by the will, that he is to derive no advantage from the trust.

1807.

v.

Boehm.

The great object of the testator was the benefit of the infants. If the executor had kept in his hands money to answer the probable purposes of the trust, 10,000*l.* for instance, or any other sum, such, that the Court could see an intention to administer the trust, according to his duty, and the question had been only, whether he had reserved too large a sum, I would have given him the most liberal measure. But, not beginning to act upon that principle, keeping the whole of the property in his hands, he shall not, as Lord *Eldon* says, be allowed to look back, and have the account now taken, and the allowances made, as if he had acted upon a different principle. My opinion is therefore, that this account is properly directed; and I am satisfied, that, *affirming this decree, I decide according to the real justice of the case. * 41[illegible]

Decree affirmed.

## O'KEEFE *against* JONES.

ROLLS. *March* 9, 18[illegible]

Devise, after limitation in strict [illegible] suc[illegible] then to devisor's next heir [illegible] law; a [illegible]tation or reversion.

*NICHOLAS RICE*, by his will, dated the 26th of *September*, 1765, devised a plantation called *Fowl Bay*, in *Barbadoes*, with the stock, upon trust, subject to annuities to his children; that the trustees, after his debts and legacies should be discharged out of the residue of the rents and profits, should deliver up the said trust premises to his son, *John Rice*, for his life only; but to be in no wise subject to his debts, engagements, or incumbrances; and after the death of *John Rice*, the Testator devised the premises to the first and other sons of his said son, *John Rice*, severally and respectively in tail male, with remainder to the use of the testator's eldest son, *William Rice*, for his life; with remainder to his first and other sons, severally and respectively, in tail male; with remainder to

the use of the testator's son, *Nicholas Rice*, for his life; with remainder to the use of the first and other sons of his said son, *Nicholas Rice*, severally and successively in tail male; and in default of such issue, then to the devisor's next heir at law.

O'Keefe v. Jones.

The testator died soon after the execution of his will, leaving *John Rice*, his eldest son and heir at law, *William* having died in his father's life, and *Nicholas Rice*, the younger son. All the previous charges being satisfied,
* 414 *John Rice*, with the consent of *the trustees, entered, and continued in possession until his death. By his will, dated the 13th of *September*, 1769, reciting, that he was seised in fee of the *Fowl Bay* plantation, he devised the said estate, in trust, to pay to his wife, 1,500*l.* current money of *Barbadoes*, and the yearly sum of 400*l.* during her life, and subject to those and other legacies and his debts, and devised all the residue of his estates to his nephew, *John Rice Callendar*, and his heirs forever. *John Rice* died soon after the date of his will, without leaving issue. Upon his death, his brother *Nicholas* entered upon the *Fowl Bay* plantation, under his father's will, and continued in possession until his death, in *May*, 1797, without leaving any male issue; but leaving *Alice Callendar*, his sister, and heiress at law.

The bill was filed by the widow of *John Rice*, having also survived her second husband, praying, that the will of *John Rice* should be established, and what was due on account of her legacy and annuity should be paid. *Alice Callendar*, by her will, dated the 15th of *June*, 1802, devised the plantation of *Fowl Bay* to her son, *Nicholas Rice Callendar*, and his heirs, subject to a trust term of 500 years, to raise certain sums. The defendants claimed under her will, and one of them was her heir at law.

Mr. *Richards*, Mr. *Martin*, and Mr. *Bell*, for the plaintiff, contended, that the last limitation in the will of *Nicholas Rice*, the testator, to his "next heir at law," was only a limitation of the reversion: the same in effect as a limitation to his "heirs;" not a designation of any particular person, as a purchaser; in which case it could be only an estate for life. They cited *Clarke* v. *Smith*.(a)

(a) Com. 72.

*Mr. *Hart*, Mr. *Thomson*, Mr. *Cooke*, and Mr. *Roupell*, for the defendants, insisted upon the expression, used in this limitation, a term of purchase; and upon the intention not to give the eldest son any power over the estate, anxiously limiting each son to an estate for life only: the effect of the last limitation, therefore, must be a contingent remainder to such person as shall be the heir of the devisor at the time, when there shall be a failure of issue of his sons. * 415

The MASTER of the ROLLS.

It is contended, that this testator has disposed in such a manner, that his son *John* had not the reversion in him, but that the ultimate limitation is a contingent remainder to such person as shall be the heir at law of the devisor at the time, when there shall be a failure of issue male of his sons. That, however, clearly is only the common limitation to his own right heirs, when he had made as many limitations as he thought proper, tying up the estate by entails. The argument upon the word "then," is nothing. A limitation to a man for life, and then to his heirs at law is a fee-simple; that word indicating only the order in which, not the time at which, the limitations are to take place. As to the intention, inferred from the circumstances, that estates for life only are given to these parties, there is nothing in that. The only object of the devisor was to insure the entails to the issue of these parties. It happens frequently, that the reversion vests in the eldest son, who has only an estate for life; and, when

Limitation to a man for life, and then to his heirs at law is a fee-simple.

1807. O'Keefe v. Jones.

the devisor says, "they shall not incumber, &c. that is only, that they shall not defeat the estate tail. *John Rice* therefore took the reversion, and consequently had the right to make this charge, under which the plaintiff claims.

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## *MOGGRIDGE *against* THACKWELL.

March 5. The decree affirmed.

THE decree in this cause(a) was affirmed, upon appeal to the House of Lords.

(a) *Ante*, vol. 7. p. 36.

## PROMOTIONS.

In *Hilary* Term, Mr. *Hart* and Mr. *Thomson*, were appointed his Majesty's counsel.

Mr. *Martin* and Mr. *Leach*, were called within the bar by patents of precedence.

END OF THE SECOND PART.

# CASES IN CHANCERY.

THE SITTINGS AFTER HILARY TERM,

47 *GEO.* III. 1807.

## STACKPOOLE *against* HOWELL.

ROLLS.
*March* 9.

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Presumption that a legacy to a person, appointed executor, is given to him in that character, though not apparently connected, unless there are circumstances, shewing, that it is intended for him personally.

In this case the circumstances were rather the other way; the legacies, by codicils, to the persons appointed executors by the will, standing all together, and equal in amount.

One of the executors therefore, having renounced, not entitled to the legacies.

SIR *Gregory Page Turner* by his will, dated the 17th of *May*, 1790, devised his real estates to his family in strict settlement, appointing the plaintiff and the defendants *Howell* and *Maberly*, trustees to preserve contingent remainders; and, after bequeathing to the same trustees some small leasehold estates in *Oxfordshire*, in trust, for the persons, who would be entitled to his freehold estates of inheritance, so far as the rules of law and equity would admit, gave and bequeathed all his personal estate, the said leasehold estates excepted, after payment of his debts and legacies, funeral expenses, and the charges of his trustees and executors in performance of his will, or in consequence thereof, to *Stackpoole*, *Howell*, and *Maberly*, upon trust, that they, or the survivor of them *should, as soon as conveniently might be after his decease, invest the same in the purchase of real estates of inheritance, to be settled to the same uses as his real estate; with the usual directions for payment of the interest in the mean

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time to the persons, who would be entitled to the rents, for the indemnity of the trustees, and for the maintenance and advancement of his children, and after appointing his wife guardian, and declaring, that if any of his said trustees should die, or desire to be discharged from the trusts of his said will, the said trustees, or the survivor of them, should, with the consent of his wife, appoint another trustee. He appointed *Stackpoole*, *Howell*, and *Maberly*, executors of his said will.

By a codicil, dated the 19th of *May*, 1790, the testator gave to his wife, for her own use, all his wearing apparel, watches, jewels, &c. He also gave her the sum of 2,000*l*. He then gave to the three persons, whom he had by his will appointed his trustees and executors, and to his steward, legacies in the following terms.

"I also give to her brother, Mr. *Joseph Howell*, of "*Clune*, in the County of *Norfolk*, the sum of 300*l*. I "also give to *George Stackpoole*, Esq. of *Grosvenor-place*, "*London*, the like sum of 300*l*. I also give to Mr. "*Thomas Astley Maberly*, of *Hatton-Garden*, attorney "at law, the like sum of 300*l*. I also give to my steward, "Mr. *John Lamb*, of *Blackheath*, *Kent*, the sum of 100*l*."

By another codicil, dated the 7th of *August*, 1800, the testator gave to his eldest son, for his own use, all his
* 419 wearing apparel, watches, &c. and to his *wife, during her natural life, the use and enjoyment of all his jewels and plate, and after her death, he gave them to his eldest son for his own use. He then gave the following pecuniary legacies.

"I give to my wife, dame *Frances Page Turner*, the "sum of 1,000*l*. I also give to her brother, *Joseph* "*Howell*, of *Market-Street*, in the County of *Herts*, the "sum of 200*l*. I give and bequeath to *George Stack-* "*poole*, Esq. of *Grosvenor-place*, *London*, the like sum

"of 200*l.* I also give and bequeath to Thomas Astley "Maberly, Esq of *Bedford-Row*, attorney at law, the "like sum of 200*l.*"

Mr. *Stackpoole*, renounced probate; but claimed the legacies, given to him by the codicils, to obtain which, was the object of the bill, as given to the plaintiff, not as executor, but as a mark of friendship and kindness.

Mr. *Richards*, and Mr. *Cooke*, for the plaintiff, contended, that there is no authority, that a legacy to a person, who happens also to be the executor, shall not have effect, unless he proves the will; that for that purpose it must appear to be a legacy to the executor, intended for him in that character, and upon condition, that he shall not have the legacy; unless he answers the description of executor.

Mr. *Alexander* and Mr. *Daniel*, for the defendants.

The only circumstance, distinguishing this case, is, that the appointment of executors is first made by the will, and the legacies are afterwards given by codicils. But the legacy must be understood to be given to the plaintiff as executor, being previously appointed *executor, * 420
and not acting, he has not complied with the condition, upon which he was intended to take the testator's bounty. The case of *Read* v. *Devaynes*,(*a*) where the legacies were held to be given to the executors in that character, is much weaker than this. These legacies, being given to a person who is executor, the conclusion is, that they are given to him as executor. The codicils contain legacies to other persons as well as these to the executors; but in both the codicils the legacies to the three executors are equal,

(*a*) 3 *Bro. C. C.* 94. By the will in that cause, the testator appoints *Devaynes* and *Smith*, his joint executors in *England*, and requests them to accept 100*l.* each, for the friendship they have always favoured him with.

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and stand together; though, it is true, other legacies stand before and after them, which circumstance cannot have any effect. The inference, strong, if not necessary, from the manner in which these legacies are given, and their equal amount, is, that they are given in consideration of the character of the legatees: the single circumstance of resemblance among them.

Mr. *Richards*, in reply.

In *Read* v. *Devaynes*, the Master of the Rolls considered the gift of the legacies, and the appointment of the executors, as having connection with each other. It appears, by the probate of the will, that they are in the same sentence; and Lord *Alvanley*, united those circumstances. The proposition, now stated, is too broad. After the execution of the first of these instruments, the testator does not notice these persons as his executors; the last codicil being executed after a lapse of ten years. The single circumstance is, that these legacies, though given with others, happen to stand together.

* 421 *The MASTER of the ROLLS.

The question is, whether you must not find circumstances to shew, that the legacy was intended for the executor in a distinct character, otherwise, the presumption *prima facie* is, that it is given to him as executor. There is something in the circumstances, that the testator has put these legacies together, and that in both the codicils, the legacies to the executors are of precisely the same amount. It does seem, as if the testator considered them in the character of executors only. I think the plaintiff is not entitled.

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## EAST-INDIA COMPANY *against* BODDAM.

*March* 10, 11.

Petition of rehearing, after an appeal from the Rolls, dismissed.

IN this cause,(a) after the decree, pronounced by the Lord Chancellor,(b) a petition of rehearing was presented, by the same defendants who had appealed from the decree originally made at the Rolls.

(a) Reported *ante*, vol. 9. p. 464.
(b) Lord *Eldon*.

The *Attorney-General*, for the plaintiffs, took the objection, that this cause, having been heard at the Rolls, and again by the Lord Chancellor, upon an appeal from that decree, could be again heard only upon appeal to the House of Lords.

Mr. *Richards*, and Mr. *Bell*, for the defendants, in support of the petition of rehearing, insisted, that they were within the rule that prevailed in *Brown* v. *Higgs*.(c)

(c) *Ante*, vol. 8. p. 561.

* 422

*The Attorney-General.

The effect of that case, is only that the party is entitled to one hearing before the Lord Chancellor. That case is, therefore, not an authority for this purpose. This must depend upon the rule, that was applied in *Fox* v. *Mackreth*.(a) Though this slight variation was made in the decree, the complaint of the last decree, is upon the same point precisely, as that which was made at the Rolls: viz. that the decree did not give a proper indemnity. The rule, as established by *Fox* v. *Mackreth*, is, that after one hearing at the Rolls, and another before the Lord Chancellor, they ought to go to the House of Lords. When is that appeal to take place? Suppose your Lordship should introduce a few words more into the decree.

(a) 1 *Harg. Jurid. Arg.* 451. where all the cases are collected.

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East-India Company v. Boddam

The Lord CHANCELLOR.

This does not appear to me to be a special case. An indemnity was claimed by the answer, which the Master of the Rolls did not give. The appeal is, I agree, in the nature of a rehearing, and not properly an appeal. The Lord Chancellor, upon the appeal, did not give the indemnity prayed. This application, therefore, is in substance for a rehearing of a decree that has been affirmed. If this can be done twice, it may be asked again, and it seems to be contended, that there is no end of it.

The Lord CHANCELLOR.

*March* 11. If this decree is wrong, it can be reversed, or farther varied, by an appeal only.

* 423 *A rehearing is allowed before enrolment, under the sanction of counsel's opinion, that the judgment of the Court may not be surprised. But when the error imputed to the decree, is by such rehearing, brought fully before the Court for deliberation, and the decree is affirmed, the judgment ought to be final against the party complaining of the original decree, except by a regular appeal.

This rule, like all others, is open to an exception, which scarcely ought to be called an exception, as it does not clash with the principle of the rule: I mean where there is a manifest mistake, or, where the Judge, who is the author of the decree, without the argument of counsel, to produce doubts upon the subject, has reason himself, to apprehend, from his own reflection, that he has mistaken the case. There his own discretion would direct another hearing, and this is a discretion which may be safely lodged with a Court, and upon such occasion is most fit to be exercised. But after a rehearing, it ought to rest with the Court itself, and where, as in the case in ques-

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tion, the matter comes before another Judge, who has not the means of exercising that discretion, he is bound to give full credit to the judgment before delivered, otherwise, to exercise his discretion, he must rehear the cause, and there might be no end of litigation.

Appeal from the Rolls is a rehearing.

In this case, the first decree was by the Master of the Rolls. But the appeal here, is but a rehearing, and therefore, the same rule ought to apply. On the rehearing, Lord *Eldon* varied the decree, but it is not the party who obtained the original decree that complains of that variation, but the party appealing, who insists upon the right, which he claimed upon the *first hearing, and which upon the rehearing was refused. I am, therefore, of opinion, that the petition ought to be dismissed. * 424

## EX PARTE HUBBARD.

*March* 10.

Joint creditors cannot vote in the choice of assignees under a separate commission, unless they pay the separate creditors 20*s* in the pound.

THE object of this petition was, that the petitioners may be admitted to prove their debts, under a separate commission of bankruptcy, and to vote in the choice of assignees. The petitioners were joint creditors. The joint debts were represented to be 78,000*l.* the separate debts 2,000*l.* and the joint effects 32,000*l.*

Mr. *Cooke*, (in support of the petition,) admitted, that the rule, established by *Ex parte Chandler*,(a) *Ex parte More*,(b) and *Ex parte Thomas*, is, that joint creditors cannot be admitted to vote in the choice of assignees under a separate commission, unless they pay the separate creditors twenty shillings in the pound.

(a) *Ante*, vol. 10. p. 35

(b) *April* 6, 1805.

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Ex parte Hubbard.

The Lord CHANCELLOR, upon these authorities, refused to make the order.

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## *STAPYLTON *against* SCOTT.

## NICHOLSON *against* STAPYLTON.

*March* 10, 11.

Reference upon the title, an objection to the specific performance, on the ground that premises, to which no title could be made, were represented as included in the purchase and were a principal inducement to the purchaser, failing upon the evidence.

A DECREE, pronounced at the Rolls in these causes, directed a reference to the Master, to inquire, whether the defendants in the first cause, could make a good title to the premises, which were the subject of an agreement by the plaintiff, Sir *Martin Stapylton*, to purchase from the executors, in trust, of *John Nicholson*. The plaintiff appealed from that decree, upon the ground, that the subject in dispute was, whether a building, called the *Old Kitchen*, situated in the garden of the house, formed part of the premises, for which he had contracted; which, he insisted, was a strong inducement to him to purchase, and that, if he could not have that, he would not have entered into the contract.

The agreement expressed that the trustees of *Nicholson*, agreed to deliver up the house, out-houses, and premises, belonging to the late *John Nicholson*, before *Midsummer*, in consideration of 650*l*. The bill charged, that the *Old Kitchen*, was one of the out-buildings, belonging to the house, and constantly occupied with it, for forty years, by the testator, and considered as his property; that before the agreement, the defendant *Henry Nicholson*, informed *Thirkill*, the plaintiff's game-keeper, that the defendants would sell to the plaintiff the *Old Kitchen*, and had since told *Thirkill*, they were willing the plaintiff should have it; and that the desire of purchasing the *Old Kitchen*, was a great inducement to the plaintiff's purchase, being con-

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tiguous to a house, which was his property; praying, therefore, a specific performance, or, if the defendants *cannot make a title to the premises, called the *Old Kitchen*, that the plaintiff may be discharged from the purchase. * 426

The answer stated, that the agreement having taken place in *February*, 1802, upon the 18th of *May* following, the plaintiff having been let into possession, upon an application, as to the *Old Kitchen*, the defendant, *Henry Nicholson*, in conversation with *Thirkill*, represented, that it did not belong to the testator; that he occupied it many years ago, but latterly it was shut up; that nothing was said about it, at the time of the purchase; that it was not vested in the defendants, nor in the testator, but had only been formerly occupied by him, by permission of his sister; and the defendants denied, that it was one part of the out-buildings, used with the house, or which they agreed to sell.

Evidence was read on both sides, but *Thirkill* was not examined.

Mr. *Richards*, Mr. *Hart*, and Mr. *Bell*, for the appellants. *The Solicitor-General*, and Mr. *Heald*, in support of the decree.

The Lord CHANCELLOR.

According to the opinion I have expressed(a) upon the jurisdiction, to decree a specific performance, this cannot be a subject of compensation; if the fact could be made out, that the object of obtaining this building, called the *Old Kitchen*, was a strong inducement to the purchaser to enter into the contract; for I *cannot agree to the case of a contract for a house and a wharf, and the

If a purchaser cannot have what was his strong inducement to the contract, a specific performance with compensation not to be enforced.

(a) See *Halsey* v. *Grant*, *ante*, p. 73.

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wharf being the principal object, the purchaser was compelled to take the house, though he could not have the wharf. I can never agree to that case, and others that are similar to it.(a) The question now, is a mere question of fact, and if the plaintiff succeeds in establishing that fact, he ought to be delivered from the contract altogether; if he does not make it out, the decree is right. I admit, where the contract has proceeded upon the mistake of both parties, that avoids the contract at law, as well as here;(b) as upon the same principle, money that has been paid by mistake, is recovered in an equitable action, for money had and received. If the executors believed they had authority to sell, and intended to sell, and the plaintiff to buy these premises, I should hold it no contract at law, and much less in this Court. Where the purchaser's inducement to the contract depends upon a mistake of his own, to which he was not led by the vendor, meaning to sell what was his own, and by an apt description, the consideration, whether that avoids the contract, is very different; though the Court has a discretion, not to give the specific performance, but to leave the party to law.

Effect of the common mistake of both parties to a contract, and of mistake of one, not occasioned by the other, in the former case avoiding the contract

The question depends upon the fact, whether, or not, both these parties proceeded upon this mistake. Clearly this never can be put upon the ground of mistake. If there is any thing, entitling the plaintiff to avoid the contract, it is not mistake, but fraud, upon the charge in the bill, of the defendant's conversation with *Thirkill*. The answer
428 admits a conversation with **Thirkill*, very different however, from that charged in the bill, and putting fraud and mistake out of the question, being a declaration by the executors, previous to the contract, that these premises did not belong to the testator. The plaintiff has not examined *Thirkill*, but has examined another person, whose evidence is not inconsistent with the declaration to *Thirkill*, as represented by the answer. There is not evidence, ena-

(a) See *Drewe* v. *Hanson*, ante, vol. 6 p 675. *Halsey* v *Grant*, ante, p. 73

(b) *Calverly* v *Williams*, ante, vol. 1 p 210

bling the court to say, this contract is void at law; and the Court was justified in making this decree; which therefore, must be affirmed.

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SPARKS *against* THE COMPANY OF PROPRIETORS OF THE LIVERPOOL WATER WORKS.

March 6.

(a) Stat 39 Geo III

No relief against forfeiture under a by-law of an incorporated company for water works, providing, that the members shall receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent, though the lapse arose from ignorance of the call, from accidental circumstances, and absence from town, when the notice was sent

BY an act of Parliament(a) for better supplying the town and port of *Liverpool* with water, several persons by name, with such other persons as should be appointed by them, and their successors, their executors, administrators, and assigns, were united into a Company, and incorporated by the name of the Company of the Proprietors of the *Liverpool* Waterworks, and it was enacted, that the property in and profits of the undertaking were vested in the Company, in such shares, and subject to such conditions, as had been or should be agreed upon.

By articles of agreement, dated the 18th of *June*, 1799, it was declared, that the premises, comprised in the undertaking, and all the profits and emoluments, should be divided into 400 shares; and each proprietor *should have a debenture of each share under the common seal; and it was farther declared, that the committee for the time being should, and they were thereby authorised and empowered from time to time, when they shall have occasion to call upon the several parties, thereto respectively, their several and respective executors, administrators, and assigns, for the several sums to become payable and be paid by them in respect of their shares, so held by them in the said undertaking, to order and give 21 days notice at least for the payment from them of the same into the hands of the bankers to the said undertaking for the time being, to be placed to the credit and account of the Com- * 429

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pany of proprietors. The deed also contained the following proviso.

"And in case any or either of the several persons parties hereto or their respective executors, administrators or assigns shall neglect or refuse to pay his, her or their respective calls or shares of the said monies, in respect of the shares, so by him, her, or them, respectively subscribed agreeable to the true intent and meaning of these presents for or by the space of 21 days next after the day or respective days to be appointed for that purpose, then and in such case every such defaulter shall receive notice of such default or neglect by letter from the Secretary, addressed to the then or last usual place of abode of such member or members; and if the call or calls, subscription or subscriptions, then in arrear shall not be paid by the person or persons, so in arrear before the expiration of ten days next after such letter shall be so sent as aforesaid, then and in every such case the respective share or shares, of such defaulter or defaulters, shall be absolutely forfeited for the benefit of the several other members *of the said corporation according and in proportion to their respective shares of and in the said undertaking, and heir respective executors, administrators, and assigns."

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A debenture, dated the 19th of *June*, 1799, testified that *Thomas Evans* had become a joint proprietor, and entitled to one 460th share, No. 249. and all profits therefrom, subject to the covenants and agreements in the articles of the 18th of *June*, 1799, by one of which it is provided, that no share shall be transferred, until the whole of the calls, then due by virtue of the said deed, shall have been paid up to the Company's bankers, and that a memorial of the transfer shall be entered by the Secretary; and every such transfer shall contain a covenant from the person, to whom the same shall be made, to abide by the covenants and agreements in the said deed, so far as re

spects such share, and all such other regulations, by-laws, rules, and orders, as shall be made by the said Company by virtue thereof, and that no person, to whom any transfer shall be made, shall be entitled to have or receive any share or benefit from the said undertaking, until such memorial shall have been made; and that every such transfer, &c. shall be made in the mode prescribed by the said deed.

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*Evans* having also become duly entitled to four other shares, Sir *Lionel Darell*, being himself a proprietor, on the 23d of *June*, 1803, purchased on behalf of the plaintiff the shares of *Evans*, which were duly transferred accordingly. The calls in respect of the shares of Sir *Lionel Darell* were received from his bankers upon notice, sent to them according to his direction, by the officer of the Company; and, the plaintiff using the same bankers, the calls in respect of his shares were received in 431
the same manner until the middle of the year 1805, when the shares of Sir *Lionel Darell*, who died in *October*, 1803, being sold, the Company ceased to give notice of calls at the banker's. On the plaintiff's return to town on the 29th of *October*, 1805, from his house in the country, he found a letter from the Secretary of the Company, directed to him at his house in town, and dated the 2d of *October*, apprising him, that he had neglected to pay his call on his five shares on the day appointed, and duly signified to him; and that, unless he should pay the sum of 25*l.* being the amount of the call, before the expiration of ten days from the delivery of that letter, such shares would be absolutely forfeited. The plaintiff answered the letter, explaining the cause of the mistake, and adding, that he would give immediate directions for the payment; which was made accordingly the next day by his bankers to the bankers of the Company. On the 5th of *December*, when in the country, the plaintiff received another letter, dated the 4th of *December*, from the Secretary, stating, that on the first meeting of the committee, subsequent to his letter

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of the 29th of *October*, the committee had directed the receipt of it to be acknowledged; lamenting, that his absence from town, or any other cause, should have been the means of his shares being forfeited for non-payment in due time, (viz. on or before the 12th of *October* last,) of the 35th call, and stating, that the committee had ordered the 25*l*. paid to their bankers, on the 30th of *October*, to be repaid to the plaintiff's account; which was that day done accordingly, and that unfortunately it does not appear, that the Secretary had any orders to direct the plaintiff's letter elsewhere than to No. 22, Portland-place, where they had been regularly sent.

* 432 *The plaintiff in his answer to that letter stated the cause of the failure to have been from misconception, and not from wilful neglect; that shortly after the purchase by Sir *Lionel Darell* on his behalf, he left town, being ignorant, that he was liable to farther claims, until two payments had been made of 25*l*. each, whence he concluded that his friend had given the necessary directions for payment of the calls; their bankers being the same, and they were paid regularly till the 35th, the failure of which payment was occasioned by the discontinuance of the notice to his banker, in consequence of the sale of Sir *Lionel Darell's* shares; the plaintiff's first knowledge of the mistake being on his coming to town the end of *October*.

The answer to that letter stating, that it was not in the power of the committee to give the plaintiff any relief, having acted according to the laws of the Company, from which no deviation could be made, the bill was filed, praying relief against the forfeiture, and offering to pay the call with interest, and to make good the detriment, if any, by non-payment in due time, insisting, that the non-payment was solely owing to accident, and did not arise from any wilful default or neglect; the plaintiff having always left money at his banker's to pay the calls.

The defendants proved, that a letter, dated the 30th of *July*, 1805, was sent to the plaintiff's house in *London*, by the post, containing a copy of a resolution of the company, that an abstract of such part of the deed as relates to the forfeiture of shares, shall be printed, and the laws put in force against defaulters, and then followed the clause of forfeiture. That letter gave the plaintiff the first notice to pay the money *on or before the 26th of *August*. The letter of the 2d of *October*, was delivered at the plaintiff's house. * 433

(a) Mr. *Richards*, and Mr. *Wooddeson*, for the plaintiff, contended, that, though the property was forfeited at law, relief would be given in equity, and it was necessary to come into equity, for the specific relief; 1st. Upon the ground of accident; 2dly., That compensation may be had, and no injury would be sustained by the defendants; 3dly. Upon the invalidity of the by-law, as unreasonable, exorbitant, and uncertain. Upon such occasions, the Court will consider the validity of a by-law: *Child* v. *Hudson's-Bay Company*.(b) This by-law, creating a total forfeiture, the 35th call, only, being in arrear, exceeds all bounds of moderation. It is also unreasonable, the calls being uncertain, not periodical, in fixing the period of ten days from the time of sending the letter; not requiring personal notice to pay the money, having no consideration of the distance at which the party may live: the expression of that clause, being, that the party shall "*receive*," not as in the former clause, that the committee shall "*give*," notice.

(a) The arguments and judgment *ex relatione*.

(b) 2 *P Wms* p 207.

Mr. *Leach*, and Mr. *Trower*, for the defendants, insisted, that the plaintiff was without a remedy; that this was merely a case of contract; and that the plaintiff had fallen into this situation, from his inattention to the concern in which he had engaged; stating that he supposed there were to be no more calls.

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This bill is founded in forfeiture, and upon the ground that the plaintiff did not consider himself as a *partner; and offering compensation, and praying to be relieved from the forfeiture. The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential, that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases, interest might be a compensation: but in the majority of cases, it is no compensation, from the uncertainty in which they may be left. The effect is the same, whether money has been paid or not. They know the consequence. The party making default, is no longer a member; but if a party can in equity enter into a discussion of the circumstances, each may bring his suit. They must remain a considerable time, to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted, there cannot be any certainty, that every member who has made default, may not file a bill. Can the Court impose a limitation of the period, when bills may be filed. If the Court ever began to deal with these cases, the number must be infinite. This is a mode which the party has, to withdraw from a losing concern. Why is not this equity open to contractors for the government loans? Why may not they come here to be relieved, when they have failed in making their deposit; and if they could have relief, how could government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made, it ought not to be attempted. It would be hazardous to entertain such a bill. Acci-

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dent there is only the want of precaution. The plaintiff did not inform himself of the orders and rules of the company. It was easy for the plaintiff to direct the Secretary to send the notices as he pleased. The Court cannot relieve against such accidents. The plaintiff ought to have taken all due pains to inform himself.

Dismiss the bill without costs, as this is a hard case.

No relief against forfeiture by not paying instalment upon a loan to government.

The MASTER of the ROLLS afterwards mentioned a late instance in *Ireland*, of a person who, after having paid some instalments on a loan, neglected to make a farther payment, and forfeited the instalments he had paid. He petitioned Parliament for relief, but without success.



## MERREWETHER *against* MELLISH.

*March* 14.

Plea to a bill as revived upon the marriage of female plaintiff, alleging facts requiring a supplemental bill; viz a settlement. Objection of form, the plea not concluding either in bar or abatement; nor stating the necessary parties. Leave given to amend

AFTER the decision upon the motion in this cause,(*a*) a plea was put in, stating the settlement executed upon the marriage of the plaintiff, Mrs. *Merrewether*, after the institution of the original suit.

*The Attorney-General*, Mr. *Hart*, and Mr. *Owen*, in support of the plea.

The foundation of this plea is, that new rights being acquired by the settlement, a supplemental bill is necessary; according to what Lord *Redesdale*, has expressed upon this subject.(*b*) The plaintiff, Mrs. *Merrewether*,

(*a*) Reported, *ante*, p. 161. (*b*) *Mit.* 60, 64.

1807. Merrewether v. Mellish.

has not *the right to recover, or to take the account which she had when she filed the original bill. The effect of the settlement was completely to devest her right to recover the share of the personal estate, the sole object of that bill. The fact alleged by this plea is, that a deed was executed, assigning all the interest of a female plaintiff upon her marriage; that therefore, when a bill of revivor simply was filed, certain supplemental matter had taken place, varying the interest of the plaintiff, and introducing new interests in other persons who ought to be before the Court.

Mr. *Leach*, for the trustees.

This plea is open to an objection of form; not stating, that by the new fact introduced, the suit is either barred or abated.(a) A plea in equity, as at law, should state, not the fact merely, but also the conclusion; shewing the nature of the defence made by the plea, upon which the judgment of the Court is to be exercised. Every precedent of a plea has an averment, that the plea is either in bar, or in abatement. In equity, as well as at law, a plea in abatement must shew the defect; as where the ground is the want of parties, which is the substance of this plea, the defendant must shew who are the proper parties, however obvious that may be, though it does not obviously appear upon the deed, which is the subject of this plea. Lord *Redesdale*(b) states, that a demurrer for want of parties must shew the proper parties, which is much more necessary in the case of a plea: the proper office of a plea in abatement being to shew a better case. This suit certainly cannot proceed effectually upon the bill of revivor only. The real objection *is, not that the plaintiffs are not interested, but that there are not proper parties: the trustees representing the issue also, for whom they are bound to act; and cannot therefore disentangle themselves from the suit.

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(a) *Mit.* 238.

(b) *Mit.* 146. *Ante* vol. 6. p. 781 *Pyle* v. *Price*.

Mr. *Hart*, in reply. 1807.

Meriwether v Mellish.

Admitting that the defendant pleading, must shew to the Court, that upon which he relies, it is not necessary to shew that in any particular form of words; as a demurrer for want of equity, is expressed in different terms: the conclusion being the same, the want of equity. There is not in this Court, as a law, a distinction between a plea in bar, and a plea in abatement. The defendant shews, not in any precise form of words, that he ought not to be put to make any farther answer to the bill, as it stands; and the objection, if the effect is abatement only, may be cured by amendment. The office of a plea is only to introduce facts, which, combined with the bill, make the plaintiff's case defective, and the uniform conclusion of pleas is a submission, that the defendant is not bound to put in any farther, or other answer.

The *Solicitor-General*, being applied to by the Lord CHANCELLOR, said, the distinction between pleas in abatement, and pleas in bar, was very little known; and Lord *Thurlow* had said, he did not know what a plea in abatement in equity was. The Solicitor-General farther observed, that he did not know how the want of parties can form a plea in abatement; shewing, not that interest is devested, but the existence of another right; and it cannot be necessary to name who ought to be parties, as they may not be in existence.

*The Lord CHANCELLOR. * 438

This case is now reduced to a very narrow compass, in consequence of the opinion expressed by me upon the motion,(a) and confirmed upon consulting Lord *Redesdale*, that the defendant ought by a plea to take advantage of the objection, arising from the settlement upon the marriage of the plaintiff, and compel them to make the bill of revi-

(a) *Ante*, p. 161.

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vor a bill of supplement also, the plea has been put in, shewing that the right to sue does not subsist in the party who instituted the suit alone. The only consideration now, is upon the form of the plea, upon the objection made by the trustees; for there is no doubt that the plea is good in substance; viz. that the original plaintiff, a feme sole, married after the suit was instituted, and a settlement was executed; assigning all her right and interest to trustees for her and the issue, by which clearly a supplemental bill became necessary. The plea being clearly good in substance, the question is reduced to the point of form, as to the conclusion of the plea, whether it is sufficient to say the defendant ought not to be called upon for a farther answer; or whether, as at law, the plea ought to state that additional parties are necessary, naming them. If the plea is informal in that respect I shall certainly give leave to amend.

Mr. *Leach* objected, that it was not usual to give leave to amend a plea.

The *Attorney-General* and Mr. *Hart*, insisted, that it was frequently done.

* 439 *Mr. *Richards*, (*amicus curiæ*,) mentioned a case before Lord *Thurlow*, *Fletcher* v. *Raymond:* a plea being sufficient in substance, but defective in form.

Leave was given to amend.

The defendant accordingly had leave to amend the plea.

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## SEAGRAVE *against* SEAGRAVE.

ROLLS March 13 16.

Bill by a married woman, claiming under a bond by her husband to a trustee for a separate maintenance, admitted to have been destroyed by them on the ground of subsequent incontinence. The bill retained, with liberty to bring an action. Action upon a lost deed without *profert*.

THE bill filed by *Hannah Seagrave*, by her next friend, stated, that differences having arisen between the plaintiff, *Hannah Seagrave*, and her husband, the defendant, *James Seagrave*, they agreed to separate; and the defendant, *Seagrave*, accordingly executed a bond, to the other defendant, *John Twamley*, in the penal sum of 100*l.* with condition, providing, that *James Seagrave* should pay his wife, or any person by her authorised, at the house of *Twamley*, the weekly sum of 5*s.* during his life; that he should permit her to live separate from him, and to go, reside and be, at or in such place or places, family or families and with such relations and friends, as she should from time to time, notwithstanding her coverture, and as if she were a feme sole, and unmarried, think fit; that he should not sue or molest any person, &c. and permit her to see her child, &c.

The bill prayed an account of the arrears of the weekly payment, that the defendant, *Seagrave*, and in case of default by him, *Twamley*, may be decreed to pay the same with interest, that the bond may be brought into Court, if not cancelled or destroyed, and, *if it has been cancelled or destroyed, that another bond may be executed to a trustee for the plaintiff; charging, that if the bond was delivered up to *Seagrave*, or cancelled, or destroyed, that was done without the knowledge or consent of the plaintiff, by collusion between the defendants to defraud the plaintiff. * 440

The answer of the defendants represented, that the separation took place in consequence of adultery committed by the plaintiff. The defendants admitted the bond, as stated in the bill; except, that the payment of the allowance was expressed in the bond to be restrained to such time

1807. Seagrave v. Seagrave.

only as the plaintiff should continue to live and reside in the house and family of *Twamley*. They admitted, that the bond was delivered to *Twamley*, to be kept for the benefit of the plaintiff; and that it was burnt by him with the consent of the defendant, *Seagrave*, the plaintiff having discontinued to reside in *Twamley's* family, and having gone to live with another man. They submitted, that the plaintiff, by the departure from her husband, and afterwards from the house of *Twamley*, and by the adultery, forfeited her right to the said allowance for maintenance, or to any other, and all right to relief in this Court, in respect of the bond securing the same.

The defendants went into evidence of the plaintiff's subsequent incontinence with the same person who caused the separation, and against whom the husband recovered damages in an action, and with other persons; and that the payments under the bond were made, until the plaintiff left *Twamley's* house, and went to live as represented by the answer.

Mr. *Alexander* and Mr. *Trower*, for the plaintiff.

* 441 *The cases, upon the question, whether articles of separation can be executed in this Court, *Whorewood* v. *Whorewood*,(a) *Mildmay* v. *Mildmay*,(b) *Hincks* v. *Nelthrope*,(c) *Head* v. *Head*,(d) were much considered in *Guth* v. *Guth*,(e) where, notwithstanding the offer of the husband, Lord *Alvanley* made the decree, enforcing a specific performance of such an agreement. The imputation by the defendant of improper conduct in the plaintiff, cannot be an objection: That was the ground of separation, and the inducement to the bond. Though such conduct cannot be justified, many circumstances of mitigation may exist. But the

(a) 1 *Ch. Cas.* 250. 1 *Rep. Ch.* 118. *Rep Ch* in the time of Lord *Nottingham*, 153. (b) 1 *Vern.* 53. (c) 1 *Vern.* 204. (d) 3 *Atk.* 295. 547. (e) 3 *Bro. C. C.* 614.

Court cannot go into such an inquiry, and will look only to the agreement.



Mr. *Hart* and Mr. *Cowper*, for the defendants.

The jurisdiction of enforcing contracts of separation, and rights, arising out of them between husband and wife, was never assumed without reluctance; even where the separation proceeded, not from any criminal conduct, but merely from discordant tempers. The last case *Legard* v. *Johnson*,(*f*) upon a very able review of this subject establishes, that in no case, not even that of mere discordance of tempers, can a wife come to this Court for the execution of an agreement for a separate maintenance against her husband; that the Court will not interfere at the instance of the wife; and that principle was approved by Lord *Eldon* in the late case of Lady *St. John* v. Lord *St. John*,(*g*) and not with the qualification of Lord *Rosslyn*, that the Court will interfere *at the instance of the person, who agreed to indemnify the husband against the debts of the wife; a qualification, which does not apply to this case. The result of the authorities is, that *Guth* v. *Guth*(*a*) should not be followed; the spiritual Court having exclusive cognisance upon the rights arising out of marriage; and this Court having no jurisdiction upon contract between husband and wife. The conduct of this plaintiff, however, makes the consideration of those cases unnecessary. The payment was regularly made, until by that conduct the object of the bond was at an end. The effect of such conduct is to deprive the party of all claim, *Watkyns* v. *Watkyns*,(*b*) *Lee* v. *Lee*.(*c*) In *Ball* v. *Montgomery*,(*d*) Lord *Rosslyn* refused to give the wife, living in a state of separation, any assistance even out of her own property.

(*f*) *Ante*, vol 3 p 352.

(*g*) *Ante*, vol. 11 p 526. See *Cooke* v. *Wiggins*, *ante*, vol 10 p 191.

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(*a*) 3 *Bro C. C* 614.

(*b*) 2 *Atk.* 96.

(*c*) 1 *Dick.* 321.

(*d*) *Ante*, vol. 2 p. 191

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Seagrave v. Seagrave.

Mr. *Alexander*, in reply.

At least the plaintiff is entitled to relief against the trustee, guilty of a wilful breach of trust by destroying the instrument; thereby preventing relief at law. *Legard* v. *Johnson* was decided upon the ground that the Court would not act against a creditor.

The MASTER of the ROLLS.

*March* 16. It does not appear to me, that this case brings into question any point touching the jurisdiction of this Court to enforce an agreement for separate maintenance, where such agreement rests in articles between the husband and the wife. It is not for that purpose that this plaintiff comes here; but, a legal instrument having been executed,
* 443 by which the husband became *legally liable to pay a separate maintenance to a trustee for his wife, and that instrument having been wrongfully destroyed, the question is only, whether this Court will not interpose to the extent that is necessary to put the parties in the situation, in which they would have been, if the destruction of that instrument had not taken place; for I cannot hold, that, as a separate maintenance is the subject, the trustee contracts no kind of duty towards the *cestui que trust*, but may arbitrarily determine, whether the instrument shall or shall not be enforced, or whether it shall be destroyed. The wife has precisely the same right, that any other *cestui que trust* has, in any case, to call upon the trustee to act; and the same right to apply to the Court for such relief as the loss or destruction of the instrument may make necessary.

Then does the adultery of the wife preclude her from having that relief here? If that fact does not at law put an end to the liability of the husband to perform the con-

dition of his bond, I do not see, how by destroying or procuring the destruction of the instrument, he should release himself from that obligation. At common law, dower was not forfeited by adultery. The forfeiture was introduced by the statute of *Westminster* 2.(a) A jointure is not forfeited by adultery. But it is said, this Court will never interfere in favour of a woman who has committed adultery, to enforce any right against her husband. That is not so. This Court does interfere for the purpose of enforcing the performance of marriage articles, though the husband may have proved that his wife is living separate from him in a state of adultery. In the case of *Sidney* v. *Sidney*,(b) the Lord Chancellor inclined to that opinion; *though it was not necessary to determine the point. But in *Blount* v. *Winter*,(a) in 1781, the Court did specifically decree the execution of marriage articles, making a provision for a woman, whom her husband proved to be living separate from him in a state of adultery; the husband insisting upon that ground, that he was not bound to perform the articles; and that this Court ought not to interfere. That case is stronger than this; the Court having in that instance given to the wife, notwithstanding her misconduct, an advantage that she did not before possess against her husband; whereas this plaintiff seeks only, that she may not by the tortious act of her husband and her own trustee be deprived of an advantage, of which she was actually in possession.

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Adultery a forfeiture of dower by stat. of *Westminster* 2. not of a jointure, and does not prevent a performance of the marriage articles

(a) Stat 13 Ed I c 34.

(b) 3 P Wms. 269

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(a) 3 P Wms. 276 Mr. Cox's note.

Then what is the extent of the relief necessary? The plaintiff has obtained a discovery; an admission, that the bond is destroyed. According to modern doctrine, therefore, an action upon the bond will lie without *profert*. All therefore that the plaintiff seems to require, is, that she may be at liberty to bring that action in the name of her trustee; and that is all therefore that I shall decree. The question that is made between these parties, with regard to the real tenor of the condition, will be open;

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and it is more fit, that it should be investigated at law than in this Court. I do not conceive, there is any necessity to lay a restriction upon the party not to crave *oyer* of the bond; which would formerly have been necessary. But since the late decisions(*b*) that is not necessary.

(*b*) *Keal* v. *Brookman*, Term Rep 151. See the *East India Company* v. *Boddam*, ante, vol 9 p 464. *Ex parte Greenway*, ante, vol 6 p 812.

* 445

*The decree was made accordingly, reserving farther directions until after the trial.



Rolls. *March* 12, 17.

## BRADLEY *against* WESTCOTT.

Distinction between property and power. Bequest of all money, stock, &c and all other personal estate, to the sole use of the testator's wife for life, to be at her full, free, and absolute disposal during her life, without being liable to any account, and after her decease, certain articles specified, and 500*l* according to her appointment by will, in default of appointment, to fall into the residue, which was disposed of. An interest for life only, with a limited power of disposition. Power of appointment not executed by general words in a will, "all my personal estate," &c. and "all my estate and interest therein."

*JOHN SWARBRECK*, by his will, dated the 5th of *December*, 1788, gave and bequeathed, after the payment of his just debts and funeral expenses, all his money, stock, funds, or securities for money, household goods, plate, china, jewels, and other effects, his carriages and horses, and all other his personal estate and effects, whatsoever and wheresoever, arising or becoming due, or which he should be entitled to at the time of his decease, unto and to the sole use and behoof of his wife, *Elizabeth Swarbreck*, for and during the term of her natural life; to be at her full, free, and absolute disposal and disposition, during her natural life, without being in any wise liable to be called to any account of or concerning the amount, value, or particulars thereof, by any person or persons whomsoever; and from and after her decease, he gave and bequeathed such of his said wife's jewels, wearing apparel, and other paraphernalia, household furniture, and plate, which she should be possessed of at the time of her death,

together with 500*l.* in money, unto *and to the use of such person or persons, and in such parts, shares, and proportions, as his said wife by her will, duly executed, should direct or appoint; and for want of such direction or appointment, he directed the same to fall into, and be considered as part of his personal estate, which should remain undisposed of by his said wife at the time of her decease; and from and after the decease of his said wife, as to such residue, he bequeathed the same as after mentioned.

The testator then gave several pecuniary legacies, and as to all the rest, residue and remainder, of his said personal estate which should remain undisposed of by his said wife at the time of her decease, subject to and after the payment of the several legacies beforementioned, and to any additional legacies, he gave and bequeathed the same unto his cousin *Sarah Gregory*, to have, receive, and take, the dividends, interest, and proceeds, of such remaining personal estate to her own proper use for and during the term of her natural life; and from and after her decease, to her son, *George Gregory*, for life; and after his decease, the testator gave and bequeathed all such residue of his personal estate unto and amongst all and every the child and children of *George Gregory* equally; and, in default of such issue, the testator gave and bequeathed such residue of his personal estate unto and amongst such person or persons, in such shares and proportion, and in manner and form, as his personal estate would have become divisible, in case he died intestate, a batchelor, and without issue; and he appointed his wife sole executrix.

The testator died in 1790. His widow proved his will; and died in 1803. By her will, dated 21st of *October* 1800, after payment of her debts and funeral expenses, she gave and bequeathed in these terms: "all my personal estate, "money, securities for money, goods, chattels and effects "whatsoever and wheresoever, and of what nature, kind or

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quality soever, and all my estate and interest therein," to trustees, upon trust, for *Elizabeth Westcott*, her executors, &c. to be paid, &c. at her age of 21, or marriage, for her own absolute use and benefit; and appointed the trustees her executors.

The bill was filed by the trustee, to have the rights of the defendants ascertained; the defendant, *Elizabeth Westcott*, by her answer submitting, whether *Elizabeth Swarbreck* had not power to dispose of the whole of her husband's property, by her will; and whether she did not accordingly, by her will, make a valid appointment of his personal estate, and claiming all such estate as is given to the defendant by the will of *Elizabeth Swarbreck*, together with the sum of 500*l.* The other defendants, the family of *Gregory*, claimed under the residuary disposition of the testator, *John Swarbreck*.

*Mr. Wetherell*, for the defendant, *Elizabeth Westcott*.

Either the widow had, under the will of her husband, the absolute interest; or, if she had only a power, her will, though not appearing to be made under the power, or containing any distinct reference to it, is sufficient to pass the property. With reference to the first point, the interest for life, given by the first part of the will, is, by the effect of the subsequent words, enlarged to an absolute interest. The wife is no more to be called to account as to the money, stock, and securities, than as to the articles of furniture, plate, jewels, &c. *quæ usu consumuntur*. If there were

* 448 no *articles of the latter description, the construction must have been a clear, absolute, power of disposition; and, admitting the distinction, how can the clause be applied respectively? The expression in the disposition of such of his wife's jewels, &c. as she should "be possessed of at the time of her death," seems to import property, before absolutely vested in her; and the subsequent expression as to his personal estate, "which should

"remain undisposed of," by his wife at the time of her decease, supports the same construction; the entire disposition previously given to her. Admitting the doubt, upon the limited power expressly given to her, that cannot controul the clear diposition of the whole given before, which is the sound and true construction. The other clause is ambiguous. It may refer to what she should not have thought fit to dispose of, meaning, that she might, if she should think proper, dispose of the whole during her life; but, if any thing should remain at her death, she should have power to dispose of that in this particular manner by will. If the two clauses cannot be reconciled, a subsequent direction, incompatible with a preceding gift, shall not prevail over it. The case of *Standen* v. *Standen*,(a) is decisive upon the effect of the will of the widow, as an execution of the power of appointment. The general words, "goods, chattels, and effects," will comprise the plate and furniture; though not described as taken from her husband. Those articles were in her possession; and so exclusively, that no person could take them out of it.

(a) *Ante*, vol. 2 p. 589.

Mr. *Thomson* and Mr. *Bell*, for the defendants, *Gregory*, and his children.

*The argument for the other defendant destroys the distinction between property and power. The will of the widow has not the slightest expression of reference to any power to dispose by will. Her will relates merely to *her* personal estate. According to this argument the question in these cases would be, whether a will was made; not, whether a power was executed. In *Standen* v. *Standen*,(a) the fact distinctly appears, that the bill contained a disposition of real estate; the testatrix having no real estate except that, as to which her husband had given her a power of disposition; and her will was attested by three witnesses. The will in that respect would have been inoperative, unless it had been referred to the power. That * 449

(a) *Ibid*

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will, also, upon the expression, "interested in, or entitled "to," might fairly be represented as reaching beyond her own property. If this was not the ground of that determination, that case has destroyed the distinction between power and property.

Upon the question, "whether the widow took the "absolute property," this will is not free from ambiguity; but the intention appears sufficiently distinct to afford a safe construction. The intention is clear, that the widow should have the absolute uncontrouled use of this property during her life; and as to part, the jewels and other articles specified, and the sum of 500*l.* in money, she has a power of appointment. That express power must be struck out by holding, that she had by the previous words the absolute disposition of the whole. 'The general rule is clear, that for the execution of a power, intention must be shewn; and mere general words are not sufficient. This will has nothing else.

* 450 *Mr. *Wetherell*, in reply.

The decree in *Standen* v. *Standen*,(*a*) was affirmed in the House of Lords. The subsequent cases, *Langham* v. *Nenny*,(*b*) and *Croft* v. *Slee*,(*c*) are distinguished by the circumstance, that the interest was contingent. An expression, applicable to a certain interest, over which the testator has an immediate power of disposition, is not applicable to an interest uncertain and contingent. Lord *Rosslyn*, in *Standen* v. *Standen*, appears inclined to establish a general rule, that a bequest to a person, with an absolute power of disposition, amounts to property, beyond the effect of a qualified power. But, upon the question as to the intention to give the absolute property, if that is not the construction, the direction that she is not to be liable to be called to account, must be struck out; the other construction not requiring any part to be struck out; as the partial power of appointment may be

(*a*) *Ante*, vol. 2. p. 589.

(*b*) *Ante*, vol. 3. p. 467.

(*c*) *Ante*, vol. 4. p. 60. *Nannock* v. *Horton*, *ante*, vol. 7. p. 391. *Bennet* v. *Aburrow*, *ante*, vol. 8. p. 609.

applied to the case of her not choosing to dispose of the whole.

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March 17.

The first question in this case is, what interest Mrs. *Swarbreck* took under the will of her husband. If she took the absolute property in his personal estate, the other question, upon the effect of her will, does not arise. If she took an interest for life only, the question does arise, whether by her will the power, given to her to dispose of a specific part of the property, is well executed.

*With respect to the first question, as the testator has given to her in express terms an interest for life, I cannot, under the ambiguous words afterwards thrown in, extend that interest to the absolute property. I must construe the subsequent words with reference to the express interest for life, previously given, that she is to have as full, free, and absolute disposition, as a tenant for life can have, and there is a farther direction, immediately following, for the purpose of preventing those, who may have claims under the subsequent part of the will, from disturbing her, during her life, by calling for inventories, or other accounts. From the mode of giving the residue a sort of implication arises, that he intended to give her the right, if she thought fit, to spend the whole of what was given to her in the former part; directing, that in case she should not execute the power, that part of the property shall fall into, and be considered as part of his personal estate, which shall remain undisposed of by her at the time of her decease. From that is inferred, that only what should remain undisposed of was intended to be the subject of his residuary disposition. It is necessary to construe this to be either a mere interest for life, or to be property in the widow. There is no medium, for I cannot say, she shall have an interest for life, with a pow- * 451

Effect of power to dispose, amounting to property, notwithstanding a limitation of what should be left undisposed of, from the uncertainty

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er to dispose of the whole, if she thinks fit; but the will of her husband shall operate upon what she shall leave undisposed of. Upon that construction it would be property, as it would be absolutely uncertain, what would be the subject of the residuary bequest.(a) That construction is impossible for another reason; from the express power to dispose of part, which is quite inconsistent with the supposition, *that the absolute right in, or power to dispose of, the whole was given to her before.

(a) *Malim* v. *Keighley*, *ante*, vol. 2. p. 333. 529. *Pushman* v. *Filliter*, *ante*, vol. 3. p. 7.

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With regard to that part of the will, by which he gives such of his wife's jewels, and other articles, which she shall be possessed of at her death, to such persons, and in such shares, as she shall by her will appoint, she must execute that power, and the question is, whether by her will she has well executed it. My opinion is, that she has not executed her power. Her will has no reference whatsoever to the will of her husband, or to her power. She has not used any words, from which I can collect, that she was exercising her power. All the words she employs are applicable to her own personal property. Her will is thus expressed: "all my personal estate," &c. and "all *my* estate and interest therein:" that is "in my own" personal estate. Her will does not contain a word, with any operation, that the mere appointment of an executor would not have had. The executor would have taken all her personal estate, whatsoever and wheresoever, in which she had any interest. Yet it has been held, that the appointment of an executor is not a nomination of an appointee, to take under the will of a prior testator, giving a power of appointment.

Power of appointment not executed by appointing an executor.

The only case, which appears to be any kind of authority, is that, which is relied on, *Standen* v. *Standen*;(a) and certainly the argument of Lord *Rosslyn* does go the length, that the very same words that are sufficient to dispose of a person's own property, are sufficient to dispose

(a) *Ante*, vol. 2. p. 589

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of property, over which he has an absolute power of appointment.

*If that would be sufficient, there would be no distinction between power and property. The distinction is perhaps slight, which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established, that in the latter case the property vests. A gift to *A.* and to such person as he shall appoint, is absolute property in *A.* without an appointment: but if it is to him for life, and after his death, to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to any thing. If that distinction exists, it is impossible that the power can be executed by the very words, by which property is given.' * 453

Distinction though slight established between gifts for life, and indefinitely, with power of disposition. The latter vests the property without appointment; the former requires appointment.

'I agree, that the decision in the case of *Standen* v. *Standen* is right; and admit it as a binding authority. I dissent only from the argument upon which the Lord Chancellor proceeds. The decision appears to me to be right upon the argument of the counsel; for Lord *Redesdale* and Sir *James Mansfield*, do not put the case at all upon the ground upon which the Lord Chancellor rests. They contended, that the power was well executed; but upon special grounds; depending on the circumstance, that the will was attested by three witnesses, with reference to her power to dispose of that estate. Upon that argument the decision is perfectly right; for it is evident, the testator is applying her will to the subject of her power, and if I find that she is speaking of the subject of her power, an express reference to the power is not necessary.

Power may be executed by will, applying to the subject without an express reference to the power.

There is a case before Lord *Eldon*, *Roach* v. *Haynes*,(*a*) upon an appeal from a decree of mine, *long subsequent to * 454

(*a*) *Ante*, vol. 8. p. 584.

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that case, and upon that occasion Lord *Eldon* had no idea that the law had been altered in that respect, or that property, over which the party had only a power, would pass by the same words as his own property. Lord *Eldon* says,(a) "The long annuities could not pass under the words "in the codicil, '*my estate and effects*,' for it has been re-"peatedly held, that a person having a power to dispose "of the personal estate of another, cannot pass it under "such a description."

(a) *Ant.* v. 1 & p. 585

If the subject of a power cannot pass under such a description, this property cannot pass under the description by this lady's will, for there is not in that will, a word that is not applicable to her own estate and effects.

Therefore declare, that the party claiming the sum of 500*l.* and the specific articles comprised in the power, is not entitled to them



*March* 1.

## BLACOE *against* WILKINSON.

Injunction to stay trial just at the time of the Assises, refused

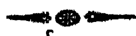
A MOTION was made to extend an injunction to stay trial. The action, founded upon a demand for board and lodging, was brought in *September* last, and the commission day at *Lancaster*, where the action was to be tried, was the day preceding that on which the motion was made by a continuation of the general seal.

* 455 *Mr. *Richards*, in support of the motion, mentioned the practice of the Court of Exchequer.

The *Solicitor-General* opposed the motion; observing, that the practice in the Exchequer is confined to the issuable terms, and insisting, that the rule was settled in this

Court to refuse such an application immediately before the trial, and upon good reason: all the expense being incurred, the witnesses attending, and in this instance, the cause perhaps over, before the order could reach *Lancaster*; such a practice therefore must have a very mischievous effect, particularly in the instance of a trial at the Assises.

The Lord CHANCELLOR asked, whether they would give security for the costs, and that being declined, said he would not grant such an application the instant of the trial.



BLIGH *against* ——. *March* 21

The only answer to the motion to dismiss for want of prosecution, is the usual undertaking to speed the cause. A special ground must be the subject of a special application.

A MOTION was made to dismiss the bill for want of prosecution. This was the second application, after the usual undertaking by the plaintiff to speed the cause, upon a former motion for the same purpose.

Mr. *Lewis*, for the plaintiff, stated upon affidavit, that the delay arose from the conduct of a defendant, whose answer could not be got in, though all diligence had been used.

Mr. *Johnson*, in support of the motion, observed, that this is a motion of course; to which the only *answer is *456

1807. Bligh v. ——.

the usual undertaking to speed the cause.(a) Any special ground must be the subject of special application.

The Lord CHANCELLOR.

At law after a peremptory undertaking to go to trial, a special application necessary.

The practice, as it is stated, that the plaintiff must come with a special application, stands upon principle and reason; as at law, after a peremptory undertaking to go to trial, a special application is necessary.

(a) *Monteith* v. *Taylor*, *ante*, vol. 9. p. 615. *Lyon* v. *Dumbell*, *ante*, vol. 11. p. 628.

The undertaking upon the first application is, generally, to speed the cause. If the plaintiff does not proceed, the defendant after the expiration of another term may move again to dismiss; and then the undertaking is special; to go to commission, give rules to pass publication next term, and set down the cause for the following term: and upon default, the bill to be dismissed without farther motion.

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1806 *December* 16, 17, 18. 1807 *March* 28.

## BUCKMASTER *against* HARROP.

THIS cause(a) was heard upon an appeal by the plaintiff, from the decree pronounced at the Rolls, dismissing the bill.

(a) Reported, *ante*, vol. 7. p. 341.

To entitle the heir to the performance of an agreement for the purchase out of the personal estate, the agreement must have been binding upon the parties contracting, so that the property was converted in equity before the death.

New evidence on an appeal from the Rolls; being in truth a rehearing.

Sale of land by auction is within the statute of frauds. Whether the statute is satisfied by the auctioneer, as the agent of both parties, putting down the biddings, &c. *Quære*: that fact not being proved to be contemporary; and the auctioneer being also vendor.

Payment of the auction duty, does not satisfy the statute of frauds upon the ground of part-performance.

Part-performance by taking possession, cutting the crops, &c.

*The evidence of a memorandum in writing by the auctioneer, did not shew that he had made entries of the biddings at the time of the sale; and an objection was taken upon that ground by the residuary legatee. A general objection was also taken upon the interest of *Wright*, the auctioneer, as being himself the vendor; who could not by his own writing, after the sale, putting down upon the conditions the name of the purchaser and the price, make evidence, which having that interest, he could not give upon his oath. The answer given on the part of the plaintiff to that objection was, that the object was not to give any direct evidence by the vendor, but merely to prove his hand-writing to the memorandum which he signed in his character of auctioneer, though after the sale, as agent for the purchaser; that the objection would go to the extent, that his book, if signed immediately, could not be received; that an objection from an interest in the auctioneer, however remote, would be a wide inlet to fraud; as if he was a creditor; the sale being for the benefit of creditors; an interest of which no one might be aware; that every auctioneer must have an interest in respect of his commission; and the extent of the interest cannot make a difference upon the objection to the competence of a witness. It was urged in reply, that there is a plain distinction between a mere auctioneer, and a person having that character, being also the proprietor, and not known by the purchaser to be so; that his interest as auctioneer is known: but the purchaser is not aware, that his interest extends beyond his commission, to the whole subject of the sale.

Another objection was to the introduction of evidence, that had not been produced at the Rolls; to which it was answered, that an appeal from the Rolls *is in truth, only a rehearing;(*a*) and therefore new evidence may be intro- * 458

(*a*) *East-India Company* v. *Boddam*, *ante*.

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duced; and Dashwood v. Lord Bulkeley,(b) and the cases there referred to, were cited.

(b) Ante, vol 10 p 250 See the authorities referred to in Mr Wyatt's edition of the Practical Register, 34

The Lord CHANCELLOR concurred in that distinction, and with reference to the other objections the evidence was read *de bene esse*.

The *Solicitor-General*, Mr. *Richards*, and Mr. *Wetherell*, for the plaintiffs, appellants.

At least this decree should have directed an inquiry as to the third lot: but upon other grounds, a specific performance of the agreement ought to have been directed as to all the lots. First, this is not a case which can be affected by the statute of frauds.(c) Either a sale by auction is completely out of that statute, according to the opinion of the Court of King's Bench in *Simon* v. *Metivier*,(d) as to sales of goods by auction, or the auctioneer must be considered the agent of both parties; to which extent that case was acknowledged in the late case, *Hinde* v. *Whitehouse*.(e) It is true Lord Chief Justice *Eyre*, and the Court of Common Pleas afterwards held (f) that not applicable to land: but with the exception of this and another case,(g) lately decided at the Rolls, there is no decision, perhaps *no dictum*, in this Court, that a sale by auction of real estate is within the statute. *In *Coles* v. *Trecothick*,(a) Lord *Eldon* expressed a strong opinion upon this subject. The intention of the Legislature must have been to put an end altogether to sales by auction, if they are reached by this statute. Upon this hypothesis the thing cannot exist. A sale by auction in its nature includes an undertaking by the vendor, that the subject shall be the property of that person who shall be the highest bidder. The effect of each subsequent bidding is to discharge all previous biddings; and if the person who is the highest bidder, can discharge himself, by refusing to sign an agreement in writing, the necessary consequence is, that any person may thus be prevented from selling his estate. Upon

(c) Stat 29 Car. II. c 3.

(d) 1 Black 599 3 Burr. 1921

(e) 7 East, 558

(f) *Walker* v. *Constable*, 1 Bos & Pull. 306 *Stansfield* v. *Johnson*, 1 Esp. Ni Pr. Cas 101.

(g) *Blagden* v. *Bradbear*, ante, vol 12. p 466

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(a) Ante, vol 9. p 234

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this hypothesis a new contract in writing is necessary, and other terms may be insisted on. In *Simon* v. *Metivier*,(*b*) the Judges must have proceeded upon such grounds as these, that if it were necessary that there should be an agreement in writing, to give effect to the transactions at the auction, the thing must be at an end. The observation of Lord *Eldon*,(*c*) that the two clauses of the statute cannot be distinguished, in this respect, is unanswerable; and the consequence is, that the decision in that case as to goods, is an authority as to real estate.

(*b*) 1 *Black.* 599 3 *Burr.* 1921

(*c*) *Ante*, vol 9 p 249

2dly. A very important point, that was not discussed at the Rolls is, that the residuary legatee cannot make this objection. It might equally be contended, that though executors had not thought it proper to insist upon the statute of limitations, the residuary legatee might afterwards take advantage of that defence: but it has been long decided, that in general cases an executor is not bound to insist upon the statute of *limitations, and cannot be charged by the residuary legatee with a *devastavit* for omitting to do so; and even an infant's remedy is lost by such omission. That discretion of an executor, not to resist a just demand, though the law would not compel payment, and though the effect is to diminish the assets for other debts, has never been controuled. The executor has a similar discretion not to set up the statute of frauds, against a just claim in equity and conscience, and a mere residuary legatee cannot represent that as a breach of trust. The law of this Court is now clear, that, if a parol agreement is admitted, and the statute is not insisted on, the agreement shall be carried into execution.(*a*) There is no principle upon which the executor may not admit the contract, to the effect of taking property from the residuary legatee in favour of the heir, as he may upon the authorities to the effect of taking from legal creditors, in favour of creditors who could not have enforced their claims at law.

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(*a*) *Cooth* v. *Jackson*, *ante*, vol 6 p 12

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The case of *Isaac* v. *Humpage*(b) turned upon collusion by the executor setting up debts which had no existence. The conduct of these executors, fulfilling this contract, is neither fraudulent, nor against the intention of the testator.

(b) *Ante*, vol. 1. p. 427.

3dly. There is in this case a part-performance, taking the case out of the statute: the payment of the auction duty by the purchaser, not to the auctioneer certainly, but to his own attorney, to be paid over. The point, whether payment of part of the purchase-money is a part-performance, has been disputed,(c) and *justly; as the money may be recovered. But that reason does not apply to payment of the auction duty. That cannot be got back again. The party cannot be reinstated, which is always considered as giving a title to the performance, as money expended in draining or building. If the payment of the duty can produce an effect upon the contract, why should not the party avail himself of it: though the revenue laws were made *diverso intuitu*.

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Next, the acts of taking possession of lot 3. and selling the crops, would without question be unequivocal acts of part-performance, taking the case out of the statute. Those facts being disputed, ought to be the subject of inquiry. Though material to the decision, they are left in great obscurity by the evidence.

(c) In *Clinan* v *Cook*, 1 *Schoales & Le Froy*, 22. (see pages 40, 41.) Lord *Redesdale* held payment of money not a part-performance to take the case out of the statute, upon the reason here assigned; observing also justly, that the question must be the same upon the payment of a guinea; which in the case of land, cannot apply as earnest. Embarrassment may certainly arise from the trifling amount of a payment; and such instances support the opinion, that the statute ought never to have given way. If however part performance should be allowed to prevail, it is difficult to conceive a more substantial act than payment of a considerable sum of money; and, when the reason is urged against it, that the party *may* be reinstated, as the money *may* be repaid, a reason as applicable to payment of the whole consideration, as of a part only, the event of insolvency cannot be overlooked.

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Lastly, the effect of the subsequent correspondence is a contract, sufficient within the statute, according to *Tawney* v. *Crowther*,(a) and other cases.(b)

*Mr. *Perceval*, and Mr. *Martin*, for the defendant, the residuary legatee, in support of the decree.

With a view to specific performance, an agreement relating to real estate, must be signed by the party, or his agent, lawfully authorised: or it must be admitted by the answer, the statute not being insisted on; or it must be in part performed. The proposition, that sales by auction are not within the statute of frauds, cannot be maintained. Such a construction of the act is not supported by authority, and is extraordinary; the act using the most general language, applicable to all contracts, that do not fall within the exceptions particularly specified. It is supposed (and that notion seems to be adopted by Lord *Mansfield*) that sales by auction were well known at the time the act passed, and the conclusion is drawn, that as the application of the act to such sales must have destroyed them, that could not have been the intention of the Legislature. If sales by auction were well known at that time, the inference is, that the statute was intended to apply to them, as such sales were not excepted: the statute using general words, applicable to every known mode of sale, and particular cases being expressly withdrawn from their operation. The opinion of the Judges in *Simon* v. *Metivier*,(a) that sales by auction are not within the statute, is extrajudicial; and has not been maintained in the subsequent cases; where the point was, whether the signature of the auctioneer did not satisfy the statute; and Lord *Mansfield* laid particular stress upon the circumstance, that the purchaser went the next day and weighed the goods--- an act of ownership. In the last case, *Hinde* v. *White-*

(a) 3 *Bro C. C.* 161 318.

(b) *Huddleston* v *Briscoe, ante*, vol. 11. p. 583. *Halsey* v. *Grant, ante*, p. 73.

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(a) 1 *Black* 599. 3 *Burr.* 1921

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(a) 7 East, 558. See p. 572.

house,(a) *Lord *Ellenborough* questions much the general proposition, that sales by auction are not within the statute; admitting the other point, that if they are within it, the auctioneer must be considered the agent of both parties: the practice having since the decision of that case, become so settled, that it would be dangerous to shake it. It is true, the language of the two clauses of the statute cannot be distinguished. The opinion of the Master of the Rolls, upon this part of the case is shortly expressed, and proceeds entirely upon the two cases before Lord Chief Justice *Eyre*, and the Court of Common Pleas. How would the necessity of a memorandum by the party or his agent, in the auctioneer's book, after the lot was knocked down, destroy sales by auction? Whatever entry the auctioneer makes is not submitted to, or subject to the controul of the bidder. In no respect is the auctioneer the authorised agent intended by the statute.

Here is no signature by a person in the character of auctioneer, this person being under circumstances, that make it impossible to take advantage of his act in that character. The Court cannot have any knowledge, that there has been a sale by auction, that any memorandum was put down of the price, except through the parol evidence of *Wright*. Whatever may be the conclusion for any other purpose, that cannot be taken to be a fact proved, to bind the property of another person.. The fact also might be, that through negligence or accident such a memorandum was not made. This is the very case to which the statute was directed: no writing appearing to have been signed. There is no doubt, upon *Tawney* v. *Crowther*,(b) and other *authorities, of the effect of a correspondence to constitute contract; if the articles and terms are stated; if the writing, required by the statute appears, whether in one shape or another; whether made at the time of sale, or acknowledged afterwards, the effect is the same. But this evidence, if it can be admitted, does not shew an

(b) 3 Bro. C. C. 161. 318. *Halsey* v *Grant*, ante, p. 73. *Huddleston* v *Briscoe*, ante, vol. 11. p. 583.

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agreement in writing, signed by the party to be bound, or his agent lawfully authorised, so as to satisfy the statute. 1807

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Taking the auctioneer to be the agent of both parties, he must make the writing at the time of the sale, in his character of auctioneer. It is too late afterwards, at any distance of time, to supply the defect. The vendor also cannot possibly be permitted to convert himself into the auctioneer, without communicating his double capacity; thus to make himself a witness for himself, putting the party with whom he is contracting off his guard, who imagines there is a middle man, and therefore, that any other witness is unnecessary. The admission of such evidence must introduce all the fraud and mischief, that is the obvious consequence of breaking through the universal rule, that a party shall not be a witness in his own cause. The parties are aware of the interest of the auctioneer from his commission; but a person contracting for an estate at the price of 10,000*l.* supposes that with the exception, he has the evidence of an indifferent man, perhaps the only witness, and the only person who has an interest to vary the terms. Certainly the general course of sales by auction is through an agent, not by the proprietor himself, and if the proprietor does think proper to assume the double character of principal and agent, he must look elsewhere than to himself for evidence, and must sustain any disadvantage that may result from his conduct.

*Another answer to the objection upon the statute may be, that the contract is admitted, and the statute is not insisted on.(*a*) This introduces the argument, that the executor has not raised, and is not bound to raise, the objection; and it is not competent to the residuary legatee to raise it. But the cases of *Isaac* v. *Humpage*(*b*) and *Alsager* v. *Rowley*(*c*) establish, that in the instance of collusion with the executor, the residuary legatee may come and state, that the assets ought not to be affected beyond the point to which the testator himself could * 465

(*a*) *Cooth* v. *Jackson*, *ante*, vol 6 p 12

(*b*) *Ante*, vol 1 p 427

(*c*) *Ante*, vol 6 p 748

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have been affected; and if the Court will interfere against the executor, acting contrary to his duty in that case, so in this, the executor refusing from favour to the heir to resist this claim as he ought, all the parties being before the Court, to prevent injustice to the residuary legatee, the person having the material interest, and to avoid circuity of action, the Court will controul such conduct in the executor. In the case of the statute of limitations, the construction put upon that case, distinguishes it very much from this. The presumption is in favour of the intention of a man to pay his debts, and the estate of the testator has had the benefit.

As to the part-performance, whatever effect the payment of the auction duty might have, if the party who paid it, sought a specific performance, here he resists it; and is content to give that up.

The Lord CHANCELLOR stopped the argument upon that point; observing, that whatever may be the effect of payment of part of the purchase money, the payment of
* 466 the auction duty, which must be paid, *whether there is any effectual contracts of sale, or not, cannot be received as evidence of the contract.

For the defendant.

The possession taken, and the consequential acts, apply only to the third lot; and the contracts are distinct. The conclusion of the Master of the Rolls upon the evidence of *Barlow* seems to be, that it proved only, that the bargain with him was completed, not that it was carried into execution, during the life of the purchaser; amounting only to this, that when he should get possession, *Barlow* should have the crops for 50*l*.

*The Solicitor-General*, in reply.

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If an understanding had prevailed that sales by auction were within the statute of frauds, that must have been known to Lord *Mansfield* and Lord Chief Justice *Wilmot*. A Court of Equity at least cannot give this statute a construction, that will make it the instrument of fraud. The mischief, which the legislature intended to prevent, cannot apply to sales by auction. They always proceed upon written terms; and Courts both of Law and Equity, have considered the printed conditions as terms in writing; so far, that they will not admit parol evidence of declarations by the auctioneer, inconsistent with those conditions; *Gunnis* v. *Erhart*,(a) ——— v. *Warmington*.(b) That is in its nature a public sale, and the attention of the witnesses is invited to what is going on. It is not open to any of the mischiefs, against which the statute was directed. Sales by auction, if this statute is applied to them, can no longer take place; as there are no means, by which *the purchaser can be compelled, when the sale is completed, to sign the agreement. The usual course at the conclusion of the sale is to sign, not an agreement, but a mere receipt for the money, or to put the name of the party in the auctioneer's book. How can the act of putting down the name, be considered a signature by both parties? Can it depend upon accident, subject to the negligence of the auctioneer? If the auctioneer is to be considered the agent of both parties, the vendor must, in a Court of Equity, be considered as having done by his agent every thing necessary for the sale. The vendor cannot be permitted to say, his agent has not done that which is essential to the sale. If it turns upon the mere circumstance, whether the name is put down, or not, the Court must, to make its decisions consistent, hold, that in all cases, the auctioneer shall be considered as having done what is necessary; otherwise, what must be the condition of the other parties? They would be in the power of the vendor, who might direct the auctioneer not to

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(a) 1 *Hen. Black.* 289.
(b) In the Court of Chancery.

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put down the name, until it could be ascertained, whether the sale was advantageous. In *Hinde* v. *Whitehouse*,(a) all the Judges considered *Simon* v. *Metivier*, as having settled the law upon this point so that it is not to be shaken.

(a) 7 East, 558.

The fact of signature by the auctioneer, if doubtful, ought to be the subject of inquiry, as well as the fact of taking possession. To the objection, that the signature did not take place at the time of the auction, the answer is, that if the auctioneer is the agent of both parties, his agency does not expire the instant the hammer is down. Why may not he put down the name the next day?
* 468 He is unquestionably the agent of both parties *in paying the auction duty long afterwards. The question can be only, whether his act relates to the sale by auction; and that does not admit of doubt; the act being inclosing to the agents of the purchaser the account, in answer to their letter desiring him to do so, sending them in that letter the conditions of sale, with the prices annexed. In a late case, *Halsey* v. *Grant*,(a) the agreement was the result of a series of letters; so this arises out of this letter, and that to which it is an answer, giving the Court all that is required in a memorandum of agreement for the sale of an estate.

(a) Ante, 73. Huddleston v. Briscoe, vol 11. p 583

With respect to the objection, that the auctioneer was himself the proprietor, the rule is settled, that the auctioneer is the agent of both parties: where is the exception from his having an interest? Suppose him constituted agent by letter of attorney; that would not form an objection, though perhaps a question might be raised, whether the party, not knowing his situation, would be bound by his act; but at least some fraud must be shewn; or some injury sustained, under the peculiar circumstances. In the case of *White* v. *Dumon*,(b) the auctioneer had advanced a sum of money to the vendor, hoping to reimburse himself by the sale; a practice that is usual, which

(b) Ante, vol 7. p 30.

gives a strong interest, yet no objection was taken upon that ground, though Lord *Rosslyn*, disliking the whole transaction, looked anxiously for objections.

With reference to the conduct of the executor, not setting up this defence, the case upon the statute of *limitations cannot be distinguished from this. Both these statutes are only laws of evidence. It is equally dishonest and immoral in many instances to take advantage of either statute, as where the debt is really due, and where a person has permitted an estate to be knocked down to him. It is decided, not only that an executor is not guilty of a *devastavit*, by not pleading the statute of limitations, but even if the residuary legatee interposes before plea put in, alleging, that the executor is a trustee, the Court will pay no attention to him, Lord *Castleton* v. Lord *Fanshaw*,(a) a decision by Lord *Somers*, that if the executor knows nothing more than that the debt is old, and it is doubtful whether it is due, or not, he is not bound to plead the statute. All the authorities upon this subject are collected by Mr. *Toller*.(b) This executor was himself a bidder at the sale, and must know all the circumstances. In *Isaac* v. *Humpage*,(c) and *Alsager* v. *Rowley*,(d) upon the collusion between the executor and the person claiming as creditor, the Court was satisfied that the debt was not due. The residuary legatee is bound to make out a case equivalent to that. The error is in considering him entitled to stand merely upon the defensive; the Court not having the means of knowing, whether he has any interest in the subject, whether the debts are paid.

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(a) 1 Eq. Ca. Abr. 305

(b) Toller's Law of Executors

(c) *Ante*, vol. 1 p. 427

(d) *Ante*, vol. 6 p. 748.

As to the part-performance, the bill was dismissed, with reference to that, upon the ground that *Barlow* might not have taken possession during the life of the testator, taking that fact as not proved. That is sufficiently proved. The sale took place in *July*. The crops were then stand-

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ing. The testator lived until *late in *September*. The presumption, therefore, is, that this transaction took place during his life. The objection is then made, that this can apply to one lot only, and the contracts are several. That arising from the conduct of the purchaser, from the manner in which he interposed, by several agents, preventing other persons from purchasing, a Court of Equity would not have permitted him to take one, and not the others. Lastly, as to the payment, suppose of 10,000*l.* the purchase money, 9,000*l.* had been paid: could the executor, by refusing to pay the remaining 1,000*l.* prevent the heir from having the estate? It is plain, the testator would not have acted so; that he would not have submitted to a forfeiture so considerable. The executor must be taken to represent the whole interest, and the question whether, upon such a proportion of the money, or a mere deposit, is the same. A Court of Equity would not permit the executor by his conduct to produce that effect. Payment of part of the purchase money must therefore be considered as a part-performance, binding all the parties, as affording evidence that the agreement had gone so far that a refusal to proceed would have the effect of fraud.

The Lord CHANCELLOR.

So many important considerations arise in this cause, with reference to the statute of frauds, questions of evidence, and how far the plaintiff and the residuary legatee are to be affected by the conduct of the executor, that it would be rash in me to come to an immediate decision. I have no difficulty, however, upon this, that as a general, naked proposition, it cannot be said sales by auction are not within the statute. But this distinction must be attended to; that if the auctioneer ought to be considered as
* 471 the agent *of both parties, and he does what is usually done, takes down in writing a memorandum of what passes, from the very nature of a sale by auction in each case generally, circumstances must be brought forward that would satisfy the statute. This statute in both these

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clauses admits but one plain construction. Why, as Lord *Eldon* observes,(a) should it not extend to land? If the conditions of sale are in writing, or printed, which are so essentially part of the contract, that not only parol evidence is rejected, but even alterations in writing are permitted with great jealousy, how little remains for the auctioneer to do. It is sufficient for him, taking minutes, putting down initials, enabling him afterwards to do the formal act. Upon his minute, with reference to the printed particular, no uncertainty can exist. My opinion, therefore, is, that as a general, naked proposition, sales by auction are within the statute; and that Judges saying they are not within it, meant no more than that, if the auctioneer, considered as the agent of both parties, does what is usually done, his memorandum in writing, if sufficient, will satisfy the statute.

(a) *Ante*, vol 9. p. 249. *Coles* v *Trecothick*.

Parol evidence against conditions of sale by auction rejected. Alterations in writing permitted with great jealousy.

The Lord CHANCELLOR.

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The circumstance in this case, that the auctioneer was also the vendor, is not immaterial. The opinion of the Master of the Rolls was, that the statute of frauds extended to sales by auction of real estate, and his opinion seems to be, that there was no part-performance of this contract, even as to the third lot. I agree with the Master of the Rolls, that the question is, whether at the death of *Finney*, a contract existed by which he was legally bound, and which, if he had *refused, this Court would have compelled him specifically to execute. This constitutes the right of his heir to call for a completion of the contract, upon the rule, that what is agreed to be done, shall be considered as done; that money under contract to be laid out in land shall be considered as land; that land under contract to be sold shall be considered as money; each assuming the character imposed upon it by the

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What is agreed to be done considered as done, as money under contract to be laid out in land, &c.

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contract; but in either case a contract according to the rules of law must exist.

Under the circumstances of this case there is no question between the purchaser and the vendor. They were both willing to perform the contract. But still the heir is entitled to call for an application of the personal estate only upon the footing of the contract; and the residuary legatee is entitled to resist the claim if there was no contract. The executors submit to act as the Court shall direct; but if they endeavoured to aid the heir, it would make no difference. The Court must consider them as trustees bound to execute their trust. The question therefore is precisely the same as if *Finney* were living, and suing, as purchaser, an unwilling vendor for a specific performance.

My opinion, then, is, that as to all the lots, except the third, upon the evidence, the requisitions of the statute of frauds are not satisfied; and the rule must be the same in equity as in law; except in certain cases, where a Court of Equity can interfere, as upon possession following the contract. I agree to the case of *Simon* v. *Metivier*,(a) which establishes, not, as a general proposition, that sales by auction are not within the statute, but that a memorandum in writing by the auctioneer, with reference to the conditions, *written or printed, are binding upon both parties. I agree with the observation of Lord *Eldon*;(a) I cannot see why the construction should not be the same as to land. The ground is, that there is a contract in writing by an agent. The statute is therefore satisfied. All contracts by brokers stand upon the same evidence. If the purchaser agrees to buy, and adopts the broker only by consenting to buy, that converts the broker into an agent, and concludes both parties, as in the case of a broker, not naming his principal, but offering cotton to sale, and a note being made in writing, both are bound, unless before the note made the purchaser countermands it; a case that has happened.

(a) 1 *Black.* 599. 3 *Burr.* 1921.

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(a) *Ante*, vol. 9. p. 249. *Coles* v. *Trecothick*.

Contracts by a broker, binding on both parties.

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Yet it was held in *Walker* v. *Constable*,(b) and the same doctrine is expressly laid down in *Stansfield* v. *Johnson*,(c) which I know to be correctly reported, that it is not sufficient that the auctioneer puts down the name. If the point had come directly before me, I should be disposed to say the statute was satisfied. But upon an appeal from the decision of a judge, whose opinion I so highly respect, and that judgment sanctioned by those authorities, it would be too much for me without the decision of a Court of Law upon the case, to decide according to my own impression. I am however relieved from the difficulty of considering a written memorandum of the auctioneer, distinctly proved, with reference to conditions of sale, written or printed, as not being the written contract of an agent; for here is no clear evidence of that. The only evidence that I can receive, is the written memorandum itself, unless it is lost; and it must be a cotemporary *memorandum, especially in this case; as the auctioneer being himself the vendor, though only as a trustee, could not in strictness be the agent of the purchaser. It is true, as has been insisted, the slightest interest in a witness creates incompetence; but the mere interest of an auctioneer from his commission, would not defeat his evidence; as it is a known interest, whereas the other interest may be unknown. * 474

(b) 1 *Bos.* & *Pull.* 306.
(c) 1 *Esp. Ni. Pr. Cas.* 101.

The interest of an auctioneer from his commission does not defeat his evidence.

The sales of the different lots are distinct and independent. This reduces the case to the question upon the third lot. I agree, the bargain with *Barlow* was the act of the purchaser; and would not be a part-performance, except from the possession taken. I can however deal with this case now, so as to obtain complete justice, by directing an inquiry as to the third lot. I am desirous of knowing whether these acts of *Barlow* were done during the life of the purchaser; as, if the possession was taken, and the crops were cut, before his death, the circumstance that the money was not paid till afterwards, would make no difference. How is it possible, that he

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could cut the crops in any other character than as purchaser? If he did, it falls within all the authorities as to part-performance, and though my opinion is, that great mischief has arisen out of that doctrine, pushed to the extent to which it has been pushed, yet I must execute what I find the law of the Court. The possession of *Tinney* can be reasonably ascribed to nothing but the act of a purchaser. If these acts were done in the life of *Tinney*, as the lots were sold separately, I think there will be a right to a decree as to that third lot.

Therefore direct an inquiry, whether *Tinney*, or any other person claiming under him, during his life, took possession of, and cut the crops, or did any other acts upon the premises, comprised in the third lot.



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1805, *May* 1?. 1807, *March* 17.

## *PHILIPPS *against* CRAWFURD.

Bill under the annuity act to set aside an annuity dismissed, the objections not prevailing; viz 1st. That the memorial expressed the consideration to have been paid at the date and execution of the deeds, one of the grantors only having executed on the day of the date; the other some days afterwards, occasioned merely by the residence of the one in *Wales*, the other in *London*.

2dly That 30*l* was immediately after payment of the consideration paid by the grantor to the attorney for the expense of the transaction, not by way of a colourable reduction of the consideration:

3dly. That the consideration was paid by an agent, that fact, though not stated in the body of the deed, appearing by the receipt indorsed, and being stated in the memorial

THIS cause(*a*) was heard upon an appeal from the decree pronounced at the Rolls, dismissing the bill.

Mr. *Romilly* and Mr. *Hart*, for the plaintiff, relied upon one point only; the objection upon the memorial, as stating the consideration to have been paid upon the day of the date and execution of the deeds; the fact being that they were executed on the day of the date, by the plaintiff alone, at his residence in the county of *Carmar-*

(*a*) Reported *ante*, vol 9 p 214

*then*, and by the other grantor five days afterwards, in *London*.

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Phillips v. Crawfurd.

*The Attorney-General*,(*b*) Mr. *Piggott*, Mr. *Newland*, and Mr. *Heys*, in support of the decree.

(*b*) The Hon. *Spencer Perceval*

The Lord CHANCELLOR(*c*) directed the cause to stand over until the trial of the action that was directed in the case of *Underhill* v. *Horwood*.(*d*) His Lordship however afterwards directed an action to be brought by the defendant in this cause, which was brought accordingly, and a demurrer was overruled.

(*c*) Lord *Eldon*

(*d*) *Ante*, vol. 10 p. 209.

The cause came on upon the equity preserved.

The Lord CHANCELLOR(*e*) dismissed the bill.

(*e*) Lord *Erskine*



## *KIRKPATRICK *against* KILPATRICK.

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*March* 2 28.

Bequest to the testator's two natural sons, with survivorship upon the death of either before 21, and without issue, but in the event of both dying without issue over, the interests beyond maintenance to be added yearly to the principal for their benefit, to be paid when they attain 21 The limitation over upon the death of both established As to the accumulation of a vested interest, and the payment only postponed.

SAMUEL KILPATRICK by his will, dated the 22d of *July*, 1781, after directing payment of his debts, and giving some legacies, gave and bequeathed to each of his two illegitimate sons, *James Kilpatrick*, and *Samuel Kilpatrick*, the sum of 8,000*l*. sterling out of his personal estate in bank stock in *London*. Also he gave unto each of them the sum of 70,000 current rupees, out of the money belonging to him out on bond to the *East-India* Company, when they shall have attained the age of 21 years. In case there should be an overplus of his personal estate, after the legacies herein mentioned were paid,

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he gave and bequeathed the said overplus to the aforesaid his children *James* and *Samuel Kilpatrick*, with all debts and effects that should be appertaining and owing to him at the time of his decease, to be divided equally between them, but in event of the death of either of them before he attains the age of 21 years, and without issue, his share of said 3,000*l.* and 70,000 current rupees, and his proportion of the overplus of the testator's said personal estate, to go to the survivor; but in event of both dying without issue, one of their shares above mentioned to go to the lawful son and heir of the testator's uncle *Henry Kilpatrick;* and the other share to be divided in equal proportions, between the children male and female, the lawful issue of his sister *Margaret Kilpatrick*, and the children male and female, the lawful issue of his half-sisters, *Jean Porter*, *Ann Porter*, and *Martha Porter;* and also the lawful children male and female, of his brother *John Porter*.

* 477 *The testator then directed his executor in *India* to take the earliest and safest opportunity of remitting to his executors in *London* the aforesaid sums of 70,000 rupees, and such other sums of money as may be due to the aforesaid, his two illegitimate sons; with directions for it to be put into the bank stock, or in such funds or purchase of lands as they may judge the safest and most advantageous for his said children, including the aforesaid 3,000*l.* of each, and such part or parts as may be required of the interest and profits arising therefrom to be paid regularly by his executors for the maintenance and education of them both; and the remainder of the interest and profits to be added yearly to the principal for their benefit, which is also to be paid to them when they attain the age of 21 years. Then, after giving directions as to the education of his two illegitimate sons, and giving some pecuniary legacies out of his personal property in *India* and *Europe*, he appointed executors in *Great Britain* and *India*.

The testator died in *August*, 1781, unmarried. His half-sisters, *Ann* and *Martha Porter*, and his half brother, *John Porter*, not having any issue, a decree was made, under a bill by several of the legatees, directing the usual accounts to be taken. In 1785, before any report, *James Kilpatrick*, one of the plaintiffs in that cause, died, under the age of six years and seven months, leaving his brother *Samuel*, another of the plaintiffs, surviving him. *Samuel Kilpatrick* died on the 20th of *December*, 1798, between the ages of eighteen and nineteen, not having been married.

The bill in this cause was filed by the executors of *Samuel Kilpatrick*, the younger, insisting, that the limitation in the will of the first testator, *Samuel Kilpatrick*, of the legacies of 3,000*l.* and 70,000 current *rupees and of the residue of the personal estate, in the event of that testator's two sons, *James* and *Samuel Kilpatrick*, dying without issue, was too remote and void; and therefore those legacies and that residue upon the death of *James*, under the age of 21, and without issue, vested absolutely in *Samuel*, under whose will the plaintiff claimed the whole. The bill therefore prayed that the suit may stand revived; that the funds in Court may be transferred to the plaintiff: or, if the Court shall be of opinion that he is not entitled to the whole, that the rights of the plaintiff and the defendant may be ascertained. * 478

The defendants, the son and heir of the testator's uncle, *Henry*, and the children of *Jean Porter*, afterwards *Mitchell*, claimed under the limitation over.

Mr. *Perceval*, Mr. *Hart*, and Mr. *Owen*, for the plaintiff.

The plaintiff, as the personal representative of *Samuel*, the survivor of these children, is entitled in the event that has happened, to the whole subject of the bequest,

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any time. *The only limitation of the general words in the clause, providing for survivorship between the two sons, in the event of the death of either, being just

words are laid aside, and the meaning of them crossed; but always to effectuate the general intention. What intention? That the property should go in a course of descent. That certainly is not the intention here. Here the intention is to divide it equally among them. *King* v. *Burchell* applies still less to it: and I doubt the accuracy of the report. It seems to me, Lord *Northington* did not require the declaration, that *John Harris* took an estate tail. The only question was upon the effect of the discovery to destroy the condition, added to some or other of the estates; in effect a condition not to alien. If he had not held that the father took an estate tail, he must have held that it was in the children, and they all joined in the recovery; and the question was raised by the remainderman; who contended, that *John Harris*, joining in the recovery, had destroyed his estate for life. He was heir at law. The persons, taking the next estate, were parties to the recovery also; and the only point, that could avail the plaintiff, was to suppose that, as the recovery was a tortious act, that would not let in the estate of the heir at law, as it was his own wrong; and therefore that it was an invalid recovery, being a tortious act of the tenant for life to destroy his life estate, and let in his own estate in fee, as heir. The note of the judgment is very short. The decree is right, without the necessity of making that declaration. It would be worth while, to see whether the decree is prefaced with that declaration. I doubt it, and rather think, it was for something, falling from the Court during the argument. But, if the case is not the subject of that comment, it falls under the same rule as *Doe* v. *Applin*. This decree must be affirmed.

The decree in *King* v. *Burchell*, as it appears in the register's book, merely dismisses the bill; and contains no declaration, whether *John Harris* took an estate tail, or an estate for life. Lord *Northington's* judgment, however, according to the note, (3 *Term Rep.* 296, note (*d*.)) is confined to that question; and concludes, that *John Harris* took an estate in tail-male. Taking that to be decided, it is certainly a strong case. Lord *Northington* appears to rely principally upon the necessity of construing the word "issue" as plural; yet the limitation was to the issue male of *John Harris*, and to *his* and their heirs, and to the issue female, and to *her* and their heirs; and his Lordship's conclusion upon that, is not easily reconciled with the reasoning in the other cases, as well as *Jacobs* v. *Aymatt*. See *Doe*, on the demise of *Long*, v. *Laming*, 2 *Burr*. 1100. *Doe*, on the demise of *Lyde*, v. *Lyde*, 1 *Term Rep.* 593. *Hockley* v. *Mawbey*, *ante*, vol. I. p. 143. as to the effect of the intention for distribution.

troduced in one *part, must be supposed not to have been intended, where it is not expressed.

The *Solicitor-General*, Mr. *Alexander*, Mr. *Cooke*, Mr. *Richards* and Mr. *W. Agar*, for the defendants.

The Court is desired to put upon this will, a construction, which it is admitted, cannot have effect, for the purpose of disposing the property against the declared intention of the testator to give it to another person. The presumption is in favour of the construction, if doubtful, that will be consistent with the rules of law. The general intention is clear, to give to each son, when he shall attain the age of 21, or have a family, and to give the property over only in the event of his not attaining that age, or not having a family who may want it. Can this extraordinary intention be attributed *to the testator, that if one of these legatees should die under the age of 21, leaving issue who should not survive the parent a month, that share should not go over to the surviving brother, but should go at a distant period to those more remote relations of the testator? The design upon the whole was a provision for these children, attaining the age of 21, or leaving families; and it was only in failure of both these events to go over to these more remote objects. The Court is desired only, for the sake of the general intention, to construe the words, "dying "without issue" in the latter part of the clause, as those words must be construed in the antecedent part. More violence is frequently done, to obtain a rational construction, and execute the probable intention. With that view, may not the word "so" be introduced before the words "dying without issue" in the latter part of the clause, as the words "and" and "or" are substituted for each other? (a) The general term "issue" in this context *483

(a) *Maberly* v. *Strode*, *ante*, vol. 3. p. 450, and the authorities referred to in the note (*a*), p. 452; and vol. 9. p. 201, note (*b*), *Cooke* v. *De Vandes*.

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has been restrained to the children; and where a personal benefit was intended by a limitation over, that has been opposed to the legal construction.

As to the interest, the direction that it is to be added to the principal, is a strong indication that they are to have the same fate, in addition to the argument arising from the nature of the interest, as being the produce of the principal.

The Lord CHANCELLOR.

Limitation of personal property upon an indefinite failure of issue void, as too remote.

There is no doubt, that, if this personal property was intended to go over upon an indefinite failure of issue, * that limitation is void, as being too remote. The question therefore is only, what the testator intended; and the Court will struggle against a construction, that would defeat the obvious intention of the will. The vulgar sense of the words "dying without issue," is never having had issue. The testator did not mean to permit the son, who should die first, under the age of 21, by a will to defeat his surviving brother, nor the survivor, dying under that age, by a will to defeat the limitations over. The object seems to be, that if one of these children should not have issue, and one should die under the age of 21, his legacies should go over to the other; if both should die under that age, the whole should go to other relations, looking to near relations; but if these two sons, or either of them, should attain 21, he looked no farther; but gave it absolutely. That is the construction I should put upon this will as to the principal. The construction as to the interest, may be very different.

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... om the disposition, made by this testator in favour of his two natural sons, it is evident, that he meant to put them upon an equal footing. The question upon the limitation over of this personal property, in the event of both dying without issue under the age of 21, is a mere question of intention, as it may be judicially collected from the whole will. If that limitation was intended to take effect after an indefinite failure of issue, it is too remote; if the failure of issue was confined to *the death of the survivor, the limitation is valid. Courts of Justice have uniformly endeavoured to support limitations of this description, taking advantage of any expression, from which the event may be construed, never having had issue, or may be confined to the time of the death. I have looked through all the cases, which are to be found in Mr. *Roper's* very useful book.(a) The doctrine is discussed with great ability by the Lord Chief Justice *Wilmot* in *Keily* v. *Fowler*,(b) but the case of *Sheppard* v. *Lessingham*(c) is more applicable to this. There the limitation over to the nephew, of one moiety of the stock, if *Mary Sheppard* should leave no issue living at the time of her death, or if such child or children as she should leave at the time of her death, should die without leaving any issue, was clearly good; but as to the other moiety the testatrix used shorter words; in case her said daughter should leave no such child or children, or all such child or children as she should leave, should "die without issue." Lord *Hardwicke* held the limitation over good, giving the same construction to those words, as to the words "without "leaving issue" in the limitation of the other moiety, concluding upon the whole will, that the intention was the same; and was differently expressed, as in other instances, only for shortness.

Limitation of personal property after an indefinite failure of issue void, as too remote, otherwise, if confined to the time of the death.

Courts endeavour to support such limitation, taking advantage of any expression to construe the event, never having had issue, or to confine it to the death

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(a) Roper's Law of Legacies.

(b) 6 Bro. P. C. 309 See Fearn Ex. Dev. ed by Mr Powell, 256

(c) Amb 122.

All the authorities go that way; and the intention of this testator is very clear as to the principal. The direc-

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tion as to the interest is contained in another part of the will, and is merely, that the surplus, beyond what may be required for their maintenance and education, shall be added yearly to the principal for their *benefit; to be paid to them when they attain the age of 21. All beyond maintenance is vested, though only to be paid at that age. The plaintiff is therefore entitled to the accumulation of this interest, though not to the principal.



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## SOUTHEY *against* LORD SOMERVILLE.

A devise failing, the effect of a paramount title, established as to other premises, against the express intention, that they should go together.

Limitation of personal property, if *A* should die without issue male, *B.* if living, if not, *C.* and *D.* in succession of age, to enjoy, &c not too remote.

Effect of a direction for an inventory, &c restraining a bequest of furniture, &c to an interest for life.

*CANNON SOUTHEY* by his will, dated the 30th of *May*, 1767, and duly attested according to the statute of frauds,(*a*) gave unto *John Southey*, all that messuage and tenement called *West Town House*, the lands thereto belonging except the fields or grounds called *Broadfield* and *Gatesland*, which should be possessed and enjoyed by, and with his home estate; and he gave unto him all the bonds for surrendering the same for his sole use and benefit, in order to fill up the copyhold estate with such lives as he should think proper.

All the rest of his estates and lands, both in possession and reversion, and all his reputed Manors, and fee-simple estates, and all other his copyhold and leasehold estates, (not before devised and given,) he gave, devised, and demised, to *Hugh Somerville*, and *Henry Fownes Luttrell*, their heirs and assigns, in trust, to preserve contingent remainders, and to the uses and trusts after declared; viz. to stand seised and possessed of all his fee-simple lands of inheritance, and all his copyhold and leasehold estates, in the several parishes of *Fitzhead*, &c. and elsewhere, in

(*a*) Stat 29 *Car.* II c ›

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county *of *Somerset*, (except as therein mentioned,) in trust to and for the use and advantage of his great nephew, *John Southey Somerville*, son of the said *Hugh*, for and during the term of 99 years, if he should so long live; and after that term, then to the use of the 1st, 2d, 3d, and 4th sons of said *John Southey Somerville*, and the issue male of their bodies for the like term of 99 years, as they should be in seniority of both; and, in default of issue male in him or them, then to the use of his kinsman, *John Southey*, and the issue male of his body, for the like term of 99 years; and, in default of issue male of him, then to his brother *Robert Southey*, and the issue male of him for the like term; and, in default of issue male of him, then to the testator's right heirs for ever; but, in case his said grand nephew, *John Southey Somerville*, should die without issue male, or should at any time thereafter possess and enjoy the title and estates belonging to or settled upon the *Somervilles*, then he thereby ordered and directed his trustees to permit the said *John Southey*, if living, if not, *Robert* and *Thomas Southey*, in succession of age, to enjoy and possess his mansion-house, and the estates thereto belonging, and the fields called *Broadfield* and the *Gatesland*, with all such furniture therein, and all his plate, which should be necessary for ornament and house-keeping, and not to be disposed of; and that, in case his said nephew, *John Southey Somerville*, should not think proper to dwell and inhabit in the said mansion-house, after he should arrive to the age of 21, then it should be possessed and enjoyed by *John Southey*, or his brothers in succession; stating his desire, that it might be occupied by one of his relations, as long as his interest remained; and he directed, that the copy be kept filled up with three lives in his said home estate and mansion-house; and that the fines for renewal on *adding any life or lives, should be paid out of the rents and profits of his lands in fee, so as no female life was put into the copy; and he desired, that an inventory of his household goods and plate should be taken, and kept with his title deeds of *488

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his estate for the advantage of that person who should enjoy the same, as before directed.

By a codicil dated the 6th of *July*, 1768, the testator declared, that it was his will and meaning, (notwithstanding any thing contained to the contrary in his said will,) that his two fields or closes of ground, called *Broadfield*, and 12 acres, parts and parcels of his estate at *West Town*, within the parish of *Fitzhead*, should be held and enjoyed by the person or persons, to whom he had by his will given his house and estate in *Fitzhead* aforesaid, wherein he then lived, and in the same manner, and upon the same conditions.

After the death of the testator, in 1768, the will was established by a decree in the cause, of *Somerville* v. *Lethbridge*, except as to copyhold estates, including the mansion-house at *Fitzhead*, to which Colonel *Somerville*, the father of *John Southey Somerville*, was entitled for lives, under surrenders and grants, on fines paid by him, and which estate, therefore, the testator had no right to devise. Colonel *Somerville* occupied the furniture and plate, and the premises of *Broadfield* and *Gatesland*, and continued to inhabit the mansion-house at *Fitzhead*, until 1794, within a few years of his death, when he gave up the possession to his son. By the death of the late Lord *Somerville*, the title and family estate in *Scotland*, descended upon *John Southey Somerville*, and the bill was filed by *John Southey* against Lord *Somerville*; on the ground, that by the descent of the title and estate upon him, and by his not residing *in the said mansion-house, from the
* 489 time of attaining the age of 21, in 1786, until 1794, the plaintiff became entitled to the estates, called *Broadfield* and *Gatesland*, with all the furniture and plate in the testator's mansion-house at his death.

Lord *Somerville* by his answer stated, that the testator had no right to devise his house and lands at *Fitzhead*;

the testator being, as to them, only a trustee for the defendant's father, Colonel *Somerville*. The answer further stated, that as the defendant succeeded to the said estate at *Fitzhead* under the grants and surrenders to and by his father, the defendant, so being in possession of the said estate at *Fitzhead*, ought, upon the true construction of the will, to retain possession of *Broadfield* and *Gatesland*, with the furniture and plate in the mansion-house: the intention of the testator being declared, that the said estates and furniture should be occupied and enjoyed by the person who possessed the said estate, and occupied his said mansion at *Fitzhead*. The answer admitted, that the defendant had sold the furniture, &c. the inventory having been delivered up to him, under an order of the Court, upon his attaining the age of 21.

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The question, whether the limitation of the personal property was too remote,(a) was given up by the defendant.

(a) *Kirkpatrick* v *Kilpatrick* the preceding case, and the references.

Mr. *Cooke* and Mr. *Bell*, for the plaintiff.

This is a question as to the intention of the testator upon the whole will. He conceived, that he had the right to devise the *Fitzhead* estate, which he calls his *home estate; and he has devised it, together with the two fields excepted out of the other devise. He also intended his furniture and plate to go in the same manner. The devise as to the premises, comprising the mansion-house, being defeated, not by the act of the testator, the question is, whether this intended bounty is to fail as to the rest. The intention being clear as to the whole; but as to one part, the testator not having the power of disposition that he supposed he had, is not the will to be fulfilled as to that upon which his right and his intention are both clear? Upon this will the intention cannot be ascribed to him, that the plaintiff should not take the two fields, and the fur- * 490

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niture, and the plate, unless he could also take the mansion-house; for there is no trace that he was conscious he was disposing of property, over which he had no power. The Court will fulfil the intention, as far as it can; and if by the act of a stranger it fails as to part, still it shall take effect as to the other property. The case of *Darley* v. *Langworthy*,(a) is much stronger than this, the devise failing by the act of the devisor; yet the House of Lords decided, that the revocation did not extend to the leasehold estate. That is therefore an authority, that even an expressed intention to revoke, if confined to one subject, shall not have effect beyond that. This devise fails, not from any intention to revoke, but merely the devisor's misconception of the nature and extent of his interest.

(a) *Amb.* 653. 3 *Wils* 6. 7 *Bro. P. C.* 177.

The *Solicitor-General* and Mr. *Courtenay*, for the defendant.

This bill is filed on two grounds: 1st. The descent of the title and family estate in *Scotland*, upon the defendant:
* 491 *2dly. That the condition of residence was not complied with. That condition was impossible. The estate belonging to another person, who was in possession, the devisor had no power to impose that condition. As to the other ground, the testator intended to give these particular premises only under the conception that they would be connected with the *Fitzhead* estate, to which they lie convenient; that they should be enjoyed as part of it, and not as a separate estate. The will is framed with that single object; and that failing, the disposition must fail altogether. The case of *Darley* v. *Langworthy*, is certainly an authority deserving attention; but the question, as a general point, is by no means fully settled by that case. Lord *Camden's* opinion was, that the disposition of the leasehold estate failed by the revocation of the devise of the freehold. The House of Lords held, that the intention was not expressed as to the leasehold estate; though the

estates were to go together: whether the judgment of the House of Lords upon that is sound, may perhaps be questioned. The point came under consideration in a late case, Lord *Carrington* v. *Payne*,(a) but was not determined; and Lord *Alvanley* expressed no approbation of the case of *Darley* v. *Langworthy*. There are some cases of charitable dispositions applicable to this point; as *The Attorney-General* v. *Whitchurch*,(b) and the *Attorney-General* v. *Goulding*,(c) decisions that as the primary object of the disposition could not have effect, another attached to it, though a distinct purpose, and perfectly legal, should fail also; and though it is true, charities are considered as distinct cases, they are so considered only as objects of favour.

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(a) *Ante*, vol. 5 p. 404

(b) *Ante*, vol. 3 p. 141.

(c) 2 *Bro. C. C.* 428

*As to the furniture and plate, the utmost claim can be the use of it, or the interest of the money produced by it, for the same length of time as the estate, or in all events only for life. The intention is clear, that those articles shall be enjoyed only in the house. Directions are given, that they shall not be disposed of; that an inventory shall be taken and kept with the title deeds of his estate, for the advantage of the person who should enjoy it. The enjoyment is to be of the house with the furniture. If the furniture is to be severed from the house, the subject of the devise, what is there to give a greater interest in the former, than the devisee could have taken in the latter: viz. an interest for life only; especially under these directions for an inventory, &c. * 492

The Lord CHANCELLOR.

The intention of the testator must be considered upon the whole will: the first part of which forcibly indicates a special purpose; severing from the estate devised to the

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plaintiff, these two fields, described as part of the lands belonging to that estate, contemplating a particular species of enjoyment. Upon the case of *Darley* v. *Langworthy*,(a) I should be disposed to agree with the opinion of Lord *Camden*, rather than the judgment of the House of Lords. The question is whether where a testator shews an anxious intention, that two parts of his property shall go together, and his disposition cannot have effect as to one part, the devisee shall take that which the testator intended him to take only in conjunction with the other.

(a) *Amb.* 653. 3 *Wils.* 6. 7 *Bro. C. C.* 177.

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*The Lord CHANCELLOR.

This is a very singular case, upon which I fear I must violate the intention one way or the other; for making the decree, as I must, against the defendant, the intention is not performed, as these two fields, which the testator intended to go with the *Fitzhead* estate, will go to the plaintiff; and the defendant will have the *Fitzhead* estate *alio jure*, under his father. But I must look to what he has directed; not to what may have been his intention; supposing myself to be acquainted with all that was in his mind. Finding therefore this positive provision in the will, I must hold, that these two fields must pass away from the defendant; but the *Fitzhead* estate, which, if it had been subject to the testator's will, would also have passed away from the defendant, he has *alio jure*. As to the furniture and plate, there is no doubt, the limitation is not too remote, and that objection was properly given up. The effect of the direction for an inventory is, that the plaintiff could have the use only during his life, not the absolute property. As these articles have been sold, therefore, the money produced by the sale must be laid out, and he must have the interest for his life.

1807

1806, June 15 ... 1807, April 1

Injunction until the hearing, under an order of the House of Lords, for publishing Lord Melville's trial, and prohibiting any other publication of it

## GURNEY against LONGMAN.

THE bill stated, that in pursuance of an order of the House of Lords, dated the 12th *June*, 1806, that the Lord Chancellor should give orders for the printing and publishing the trial of Lord *Melville*, and the several questions put to the Judges, and their answers, and that no other person should presume to publish the same, the Lord Chancellor appointed the *plaintiffs to print and publish the whole proceedings in the House of Peers upon the impeachment, and forbade any other person to print and publish the same, and the plaintiffs, being employed by the House of Lords to take down the trial in short hand, had, at a considerable expense, been preparing to publish it. * 494

The bill further stated, that the defendants had published a work, purporting to be the trial of Lord *Melville*, and prayed an account and injunction.

A motion was made for an injunction, and an instance of a similar order, in the case of *Bathurst* v. *Kearsley*, being produced, the counsel for the defendants were called upon to resist the motion.

Mr. *Perceval*, Mr. *Fonblanque*, and Mr. *Leach*, for the defendants.

Your Lordship cannot grant this injunction, unless you are satisfied clearly of the exclusive right of the plaintiffs; which cannot be made clear to you, until established at law, as in the two cases in *Vernon*.(a) At present it is uncertain, whether the right is put upon privilege of parliament, duty imposed upon the plaintiff, or upon copy-right. The only precedent is the case of *Bathurst* v. *Kearsley* (b) a

(a) Anon. 1 Vern. 120. Hills v. The University of Oxford, 1 Vern. 275. See 4 Burr. 2100.

(b) In Chancery, Easter Term, 17[illegible]

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case, which, with some distinguishing circumstances, certainly resembles this. In that instance, however, when the plaintiff obtained the order the defendant had not published: as these defendants had previously to the order. That case having passed without discussion, the defendant acquiescing, cannot as an authority prevail against the principle. *Bruce* v. *Bruce*,(c) turned *upon the legal title under the King's patent; and Lord *Eldon* was satisfied of the clear title of the patentee, established by previous judicial proceedings.

(c) In the House of Lords, the last Session.

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One consideration is, whether this is not an authority under the prerogative, a right, to be derived from the crown, as the right to print the statutes, rather than from the Court, where the proceedings took place. In the case of *The Universities of Oxford and Cambridge* v. *Richardson*,(a) the Lord Chancellor considers, and qualifies, the assertion of Lord *Mansfield*, that the Court will not grant or sustain an injunction, until the title is made clear at law, by reference to the course of proceedings under patents. The King exercising a general authority to grant patents, the individual, in possession under this grant, shall be quieted in this enjoyment, until a *prima facie* legal title devolving from some source of competent authority, has been proved in a Court of Law.

(a) *Ante* vol. 6. p. 689 See p. 707.

Considering the plaintiff's right under the order of the House of Lords, as a Court of Justice, that House has no more authority to make such an order than any other Court. The distinction between the legislative and judicial characters of the House is strongly marked. In the former character its proceedings are entirely its own. The first principle of the administration of justice is free access to every Court; of which the liberty of communicating to the public what passes is a consequence. The public nature of the transaction in Courts of Justice would be of little value, if the means were not afforded of letting all the world know the fairness of their proceedings. The same principle

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that requires a Court to be open, authorises the widest dissemination *of what passes, provided the representation be correct. An authority to give an exclusive right of publication infringes upon that valuable principle. The circumstances, that such publications may have been authorised in former instances, though the authority was not questioned until the case of *Bathurst* v. *Kearsley*, is of no importance, as that authority stamps a greater value upon the publication. If this right exists in the House of Lords, have not all other Courts a similar right? In the case of *The King* v. *Wright*(a) Mr. Justice *Lawrence*, referring to *Curry* v. *Walter*, recognises the value, not only of having the Courts open, but of the communication of their proceedings to the public by printing. This restriction infringes that valuable right, and cannot be traced to any legal source. The House of Lords is not under any obligation to give to the public an account of their proceedings under their own authority. It is obvious, that they may afford much facility to such publication, by permitting access to their records, some perhaps that could not be reached without that permission. But such a work must, in a great degree, be composed of materials, of which they have not the exclusive command. * 496

(a) 8 *Term Rep* 293

One very important reason against the interference of the Court in this way, is the comparative inconvenience to the one party or the other. The plaintiffs, if their right should be finally established, will have their remedy by an account on damages; and the House of Lords may, as was done in the instance of a person, who published *Sacheverell's* trial, enforce their order by commitment. But an injunction in this state, restraining a publication of a temporary nature, has the effect of a perpetual injunction; as before the right is *determined, the market is over. The plaintiff's title should therefore be clear in proportion. * 497

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If this property depends upon the privilege of Parliament, your Lordship has not the means of deciding that here. Has this Court a jurisdiction to try the privileges of the Court of Parliament? A contempt of the privileges of Parliament cannot be examined in a Court of Law, upon the return of a *habeas corpus*.

Some colour is given to this, as a right by common law, inherent in every Court of Justice, by a passage in the judgment of *Willes*, Justice, in the case of *Millar* v. *Taylor*,(a) who speaking of the judgment of the House of Lords, upon *Roll's Abridgment*, (which, though it may contain many original cases, does not answer the description of proceedings in any Court,) and *Croke's Reports*, observes, that the King had no right of original publication, "the Courts of *Westminster-Hall* having the sole "power to authorise and authenticate the publication of "their own proceedings."

(a) 4 Burr. 2303. See page 2329.

The case as to *Roll's Abridgment*, is in *Carter*,(b) which report does not support that *dictum*: the only doubt being, whether the King had by the prerogative, the right of prohibiting and monopolizing the publication of law proceedings; and the right of the patentees was established in the House of Lords. In *Roper* v. *Streater*,(c) also mentioned by Mr. Justice *Willes*,(d) the question was, not whether the plaintiff had any authority to publish *Croke's* **Reports*, but whether the patentee had any such authority, as deprived any other person of his copy-right. These cases are inconsistent with the proposition stated by Mr. Justice *Willes*. How could the right by common law in the Courts of Justice exist with the prerogative to monopolize the publication of all law proceedings: two sole and exclusive authorities subsisting at the same time? The conduct of the Judges gives no countenance to the authority attributed to them. The licensing act(a) required

(b) Carter, p. 89.

(c) Skin. 234

(d) 4 Burr. 2316

* 498

(a) Stat. 13 and 14 *Car.* II. c. 33.

their allowance; at least that of the Chief Justice; the form of which shews, that they did not claim any exclusive authority, merely following the words of the act: "we "do allow," &c. When the licensing act expired, in the reign of King *William* and Queen *Mary*, they changed their style; as in the instance of *Skinner's Reports*, published in 1728, long after the expiration of the act, the expression is, not that they allow, but that they approve; a certificate of the authenticity of the work, and of the credit due to it. That alteration shews, that the Judges did not assume the right; as supposed by Mr. Justice *Willes*.

Upon what principle are the Courts of Justice to have this exclusive power of authorising the publication of their proceedings? In modern times, the acknowledged right arises from the publication. Can any principle exist for restraining the publication of those subjects, that form the precedents, upon which property, liberty, and life, depend? Against this concurrence of practice, authority, and principle, the single instance of *Munby* v. *Owen*,(b) the case of the Court of Session at the *Old Bailey*, cannot prevail to establish this, as a common *law right, in every Court of Judicature. It is not however necessarily to be taken, that such a proposition was established in that case. The decision is right, not upon the reason supposed by Mr. Justice *Willes*, that the Lord Mayor could confer the right of property, but that property had been acquired by the publication; and being so acquired, was invaded by piracy. The assumption of that right by the Lord Mayor, probably had its origin in abuse, and cannot have any weight in direct opposition to *Roper* v. *Streater*,(a) and the case of *Roll's Abridgment*,(b) confirmed in the House of Lords. The assumption of that right may perhaps be accounted for thus: The Judges under an equitable construction of the licensing act, probably gave the right according

(b) In Chancery, 8th *April*, 1755. Cited 4 *Burr.* 2329 2404.

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(a) *Skin.* 234.

(b) *Carter*, 89.

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of any person, who cannot have recourse to the journals; who during a considerable part of such a proceeding as this must be excluded; who cannot obtain authentic information as to the questions put to the Judges, and other important particulars; and who may attend, or not, at his own discretion?

* 502 *Upon the same principle stands the right of publishing the prerogative copies, books containing the national religion, and other books of public institution, as *Lilly's Grammar*. Another person might print them as well, but upon the essential interest of the public, the law entrusts to the crown the right of appointing the person, who shall have the right of communicating them to the public. Upon those public principles, when all the other powers of the star-chamber were brushed away, these were preserved. For any public or useful purpose the right, with reference to this subject, can be only in the House of Lords itself. That House alone can know whether the appointment is properly executed.

This right, standing upon these public principles, has been recognised by this Court in the case of *Bathurst* v. *Kearsley*,(a) and a similar right, of a very inferior Court, was also recognised here in *Manby* v. *Owen*.(b) Upon what does that right rest? Not upon the statute of Queen *Anne*.(c) There is not a trace of it in the statute, nor was that publication entered at Stationer's Hall. It cannot depend upon property in the Court. There is no such property. The principle is the interest which the public have in the proceedings. The injunction is now prayed upon the same principle upon which it was granted in those two instances. It appears by the register's book, that the injunction in *Manby* v. *Owen* was granted before answer; and in 1758, a perpetual injunction was decreed with costs. In the other case, Lord *Bathurst* granted the injunction upon the ground, that the order of the House

(a) Easter Term, 1776

(b) In Chancery, 8th April, 1755 Cited 4 Burr 2329. 2404.

(c) Stat. 8

of Lords *gave the plaintiff the right of publication; which right the defendant could not invade. In *December* following, upon a notice of motion for an attachment for breach of the injunction, the defendant submitted to account. To these cases no authority is opposed. They establish the exclusive right under the grant, analogous to the exclusive right of a patentee; the effect of which is property.

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Mr. *Perceval*, in reply.

The case of *Roper* v *Streater*,(a) as finally decided by the House of Lords, establishes, that the publication of proceedings in Courts of Justice is in the grant of the crown, not the Court. *Manby* v. *Owen*(b) does not recognise any common law right in the Courts of Justice, generally. The practice of the Courts of Justice affords strong evidence, that they do not conceive they have such authority. The right would have been exerted, and the duty performed, if they were supposed to exist; the various incorrect accounts of legal proceedings, that are daily published, calling for restraint. At least this is a legal question, that ought first to be determined, and never has been determined, in a Court of Law. The plaintiffs are not in the situation of the King's printer; whose place, as Mr. Justice *Yates* observes,(c) is properly an office, formerly granted in that name, with a fee annexed; and the person appointed, sworn into office. That office is guarded by the mode of appointment; and the officer would, by a wilful or negligent failure in his duty, be liable to a forfeiture of the office, and to an indictment. These plaintiffs are under no such constraint to publish, or to publish *accurately. A Court of Law would certainly interfere against a commitment, where it appeared plainly that there had been no breach of privilege. They have examined the subject in such instances, and in Lord *Danby's*(a) case, and the other cases, where the commitment

(a) *Skin.* 234. See 4 *Burr.* 2316.

(b) In Chancery, 8th *April*, 1755. Cited 4 *Burr.* 2329. 2404.

(c) 4 *Burr.* 2384.

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(a) 2 *Harg. St Tr.* 742

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endeavour to avail themselves of the liberty to offer to the public an account of this trial.

The trial of Dr. *Sacheverell*, was published by the same authority as these plaintiffs have obtained; and other, of which I have selected some out of a great number, not only upon articles of impeachment by the House of Commons, but also trials for felony and treason. Lord *Wintoun's* trial(*b*) for high treason, and Lord *Oxford's*, in 1717, were both upon impeachment by the House of Commons; and it appears, that the House of Lords have almost in every instance, whether upon impeachment, or indictment, uniformly made this order, with the prohibition of publications by other persons. The only exceptions are Lord *Oxford's* case, and a few others. The same order was made in Lord **Lovat's* case,(*a*) in 1746, after the rebellion; and in the case of Lord *Ferrers*, in 1760, and of Lord *Byron*, in 1765, both with the prohibition. The order in the case of the Dutchess of *Kingston*,(*b*) is in the very same words as this; that the Lord Chancellor do cause the trial to be published; and that no other person do presume to print or publish the same. The order was also made in the case of Mr. *Hastings*; and in that instance the prohibition was quite unnecessary, as no one would publish, what no one would read; and the public had been saturated with previous accounts of the trial.

(*b*) 6 *Harg. St. Tr.* 17.

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(*a*) 9 *Harg. St. Tr.* 615.

(*b*) 1776. 11 *Harg. St. Tr.* 198.

In this case, if there had not been any direct precedent, I should not have granted the injunction, notwithstanding the strong practice of the House of Lords, without taking the opinion of a Court of Law, according to the authorities upon which I insisted in the case of *Bruce* v. *Bruce*,(*c*) that the Lord Chancellor ought not, unless a clear legal title is established, to grant an injunction. But upon that case of *Bathurst* v. *Kearsley*, and this practice of the House of Lords, I may grant the injunction; which I do, not upon any thing like literary property, but upon this

(*c*) In the House of Lords, in the last session.

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only, that these plaintiffs are in the same situation as to this particular subject, as the King's printer, exercising the right of the Crown, as to the prerogative copies. I shall not state any thing as to other Courts, but shall act upon this precedent, which I carry no farther than by granting an injunction to the hearing.

*It appears in the case of *Millar* v. *Taylor*,(a) that the Crown had been in the constant course of granting the right of printing almanacks; and at last King *James* II. granted the right, by charter, to the Stationers' Company, and the two Universities, and for a century they kept up that monopoly by the effect of prosecutions. At length *Carnan*, an obstinate man, insisted upon printing them. An injunction was applied for in the Court of Exchequer, and was granted to the hearing: but at the hearing, the Court of Exchequer directed the question to be put to the Court of Common Pleas, whether the King had a right to grant the publication of almanacks, as not falling within the scope of the necessity or expediency, the foundation of prerogative copies. It was twice argued in the Court of Common Pleas; and the answer returned by that Court to the Court of Exchequer was, that the charter was void, and almanacks were not prerogative copies. The injunction was accordingly dissolved, that usurpation having gone on for a century; and the House of Commons threw out a bill, brought in for the purpose of vesting that right in the Stationers' Company. * 508

(a) 4 *Burr.* 2303.

Almanacks not prerogative copies.

This is an instance of the necessity of caution upon these subjects.

*April* 1.

The Lord CHANCELLOR desired, that it should be understood, that he had not delivered any judgment *in this case, farther, than by granting the injunction until the hear- * 509

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ing, upon the precedent of *Bathurst* v. *Kearsley* (a) and should therefore consider the question as open in any future stage.

A demurrer was afterwards put in; but it was never argued, a compromise taking place.

(a) Easter Term, 1756, in Chancery

## *PROMOTIONS.

ON the 1st of *April*, the Lord Chancellor resigned the Great Seal, which was delivered by his Majesty to Lord *Eldon*, as Lord Chancellor.

Sir *Thomas Manners Sutton*, one of the Barons of the Exchequer, succeeded Mr. *Ponsonby*, as Lord Chancellor of *Ireland*; and was created a Peer of the United Kingdom, by the title of Baron *Manners* of *Foston*, in the County of *Lincoln*.

Mr. *Wood* was appointed a Baron of the Exchequer, and was knighted.

The honourable *Spencer Perceval* was appointed Chancellor of the Exchequer, and Chancellor of the Duchy of *Lancaster*.

Sir *Vicary Gibbs* succeeded Sir *Arthur Piggott* as Attorney-General.

Mr. *Plumer* succeeded Sir *Samuel Romilly*, as Solicitor-General, and was knighted.

Mr. *E. Morris* was appointed a Master in Chancery upon the resignation of Sir *W. W. Pepys*.

1807.

April 10.

## *WHITELOCKE *against* BAKER.

Motion to suppress depositions upon groundless objections, and not only after publication, but even after the cause had been called on, and struck out, refused. The privilege of paupers, for obtaining justice, not to be perverted, to injustice. The Court tender as to dispaupering. Costs against a pauper upon that ground not pressed, on the recommendation of the Court. Qualification as to evidence of tradition, even upon pedigree. It must be from persons, having such a connection with the party, that it is natural and likely, from their domestic habits, that they are speaking the truth, and could not be mistaken. Upon that principle, descriptions in wills, monuments, bibles, &c. are admitted.

Discretion of commissioners, taking depositions, not to examine each witness to all the interrogatories, and to reject what is not evidence.

A MOTION was made by the plaintiff in this cause, suing as a pauper, that the depositions under a commission, taken out by him *ex parte*, the defendants not joining, should be suppressed; upon objections to the depositions themselves, and upon misconduct, attributed by affidavit to the plaintiff's agent, and to the commissioners, one of whom was represented as being the solicitor of a person having a corresponding interest with the defendants in the question.

This application was made, not only after publication, but even after the cause had been called on in the regular course to be heard; when, the plaintiff not appearing, and the defendants not having an affidavit of the *subpœna* to hear judgment, the cause was struck out.

Mr. *Plowden*, for the plaintiff, in support of the motion; which was opposed by Mr. *Hart*, for the defendants.

Mr. *Heald*, for the commissioners, pressed for costs; insisting, that the privilege of a pauper will not protect him against the consequences of improper and vexatious conduct towards third persons, not parties to the suit.

The Lord Chancellor.

This is the case of a pauper, who represents himself as entitled to very considerable property, in the possession

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*of a variety of defendants; who are parties to the record. The effect of the privilege of a pauper is, that his case is apt to receive from the Court and the bar, protection, not merely full as zealous, but exceeding the attention, given to the affairs of suitors in different circumstances. As this is a most important application to suppress depositions that have been published, I will state the principle and the practice upon the motion to enlarge publication. This Court will not enlarge publication without a very special case made. The party's want of knowledge of the rules of proceeding, want of attention in his Solicitor, are not sufficient. The rules of justice are founded upon great, general principles, not to be broken down by such circumstances. Even such a motion requires an affidavit, that the party, his Clerk in Court, and Solicitor, have not seen, or been informed of, and that they will not see or be informed of the contents of the depositions, until the enlarged time of publication. That is founded upon this, that no more dangerous mode of proceeding can take place than permitting parties to make out evidence by piece-meal, and to make up the deficiency of original depositions by other evidence. In this case the defendants did not join in the commission. These commissioners are of the plaintiff's own choice. Frequently interrogatories are put that are not necessary; and the party, by his agent, points out the particular interrogatories, or parts of interrogatories, to which he wishes the examination to go. That is the course of practice. If previously to publication it appears, that there may be occasion for farther testimony, that there is a just opportunity for obtaining it, and it cannot be had without danger and injustice to other parties, the habit has been to allow the publication to be enlarged upon affidavit. *But, independent of the rule I have stated, the Court will not do that to the prejudice of a party, even by delaying the hearing of his cause. 513

Publication enlarged upon a special case, where farther evidence is necessary, and it can be had without injustice or danger; not upon ignorance, or negligence of an agent, nor to the prejudice of a party, even by delaying the hearing, and affidavit required, that the party, his clerk in Court and Solicitor, have not seen or been informed of, the depositions and will not, &c.

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But in this cause the depositions are published. Is it possible then for me in such a case, let the suitor be who he may, not to recollect the state of the cause? This is an instance, shewing, that it is absolutely necessary to hold men bound by the acts of their agents. This cause was set down to be heard. If an affidavit of service of the *subpœna* to hear judgment had been produced, the bill would have been dismissed. The defendant therefore is bound by the slip of his Solicitor. In this state of the cause, therefore, this is not an application merely to enlarge publication; but, far beyond all that, it is a case, in which it is impossible to make the affidavit that would be necessary for that purpose, as the parties have seen the depositions, and the cause is now in Court by the mere accident, that the defendant's Solicitor was not provided with an affidavit of service of the *subpœna* to hear judgment.

The first ground, alleged in support of this motion, is the character of one of these persons, as standing in the situation of a party, who might have been rejected as a commissioner. That, strictly, is not true, as that person was not the Solicitor of a defendant, concerned in this commission, or of any person, who remained upon the record. Considering him as the Solicitor of a person having property that might be involved in the same question, my clear opinion is, 1st. That his situation does not fall within the rule; 2dly. That such an objection, permitted in this stage of the cause, would tend to the most enormous mischief.

* 514 * The next ground for this motion is the materiality of the farther evidence, which it is supposed can be given. If that could be represented as most highly material, I dare not trust myself with laying down a precedent, that would authorise attempts to bring forward an application in every case, where, even after a cause had been struck out, the party might see that it would not be convenient to hear

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the cause upon the evidence on which he originally intended to hear it. The danger from that would be enormous. But, upon the affidavits, there is hardly any part of what is stated in these affidavits, that would in the form of depositions be evidence. I accede to the doctrine of *Lord Mansfield*, as it has been stated from *Cowper*, (a) but it must be understood, as it has been practised, and acted upon; and one word in that passage wants explanation. It was not the opinion of Lord *Mansfield*, or of any Judge, that tradition, generally, is evidence of pedigree; the tradition must be from persons, having such a connection with the party, to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. (b) The whole goes upon that; declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles, and registry books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But there may be many circumstances forming part of the tradition, which you would reject, taking the body of the tradition.

(a) *Goodright, on the demise of Stevens, v. Moss, Cowp.* 591

(b) *Vowles* v *Young, ante,* 140

*Applying that to this case, and the particular circumstances of this unfortunate person, the answer to an objection upon that ground is, that the rules of law are framed for general cases; and must apply to this, unless it is an excepted case. There is no rule, that will allow me to give the benefit of what may be called a species of secondary evidence of tradition, to a person under these circumstances, that I could not give under other circumstances. It is a misfortune, that I cannot cure. * 515

As to the conduct of the commissioners, they exercised their duty well, if they examined to those interrogatories, or parts of interrogatories, to which they were

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called upon to examine. They are not to examine to the whole body of interrogatories. The interrogatories are all together; as some witnesses may be to speak to one part, some to another, and some may be examined to all. On that account they are all put together; not for the purpose of examining each witness to the whole of the interrogatories. That ground would be sufficient against this motion.

There is another ground upon which I will not decide, as it is not necessary: but I will express my opinion. I have not a conception of a rule, that would be more mischievous, than that the commissioners should be bound to divest themselves entirely of all discretion as to what is or is not legal evidence. I should introduce a most severe scourge by obliging commissioners to take all that is offered them, whether it may have the character of evidence, or not; when the only consequence that can possibly arise, is, that the Court must shut its eyes and ears against all that has not that character. It very seldom
* 516 happens that depositions *are brought here without much trash in them, that is not evidence; not from a want of discretion in the commissioners, but from an exercise of that discretion, perhaps necessarily imperfect; and it is very difficult in taking written depositions to separate them, so as to be sure, rejecting much, that you do not incur the danger of rejecting too much. Another circumstance is, that the Court trusts the parties, and in some cases the Master, as upon motion to reform the interrogatories, with settling them, and in my own experience much might have been spared; but it arises from an anxiety to be safe. The truth is, that, when interrogatories go down with questions that are not relevant, many answers also will not be relevant.

It is not however necessary to decide this. Upon the matter of the affidavits, and the danger of introducing new evidence, I am not bold enough to make such a pre-

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cedent. As to what has been said about dispaupering this plaintiff, the Court always is, and I hope always will be, tender upon that. But it must be recollected, that the principle upon which paupers are entitled to the assistance of the bar, and have equal claims with the opulent upon the Court, is, that they may have justice. On the other hand, all Courts require, that they shall do justice to others; and, if the accident that has occurred in this cause, had happened in the Court of King's Bench, that the plaintiff was not ready, when the cause was called on, he would have been dispaupered. As to the conduct of the commissioners, it does not appear to me, that the Court, or any of the parties, have cause of complaint, and with that observation I shall refuse this motion.

*The commissioners, under the recommendation of the Court, did not press for costs. * 517



## WALLIS *against* CAMPBELL.

*April* 16

A married woman appointed guardian of an illegitimate child, payment ordered her upon her separate receipt

A MARRIED WOMAN being, under the Master's report, appointed the guardian of an illegitimate child, a difficulty arose in the register's office as to drawing up an order for payment of money to her, without joining her husband. It was therefore mentioned to the Court by Mr. *Bell*.

The Lord CHANCELLOR made an order for payment to her, upon her separate receipt, for the purposes of the order.

1807.



*April* 16.

## TWIGG *against* FIFIELD.

Sale of an annuity before the master, takes effect from the confirmation of the report, and the sale being on the 11th of *August*, and the report confirmed in *Michaelmas* term, interest was given upon the purchase money from the first day on which the report could have been confirmed, viz. the first seal before the term.

UPON the 11th of *August*, 1806, an annuity, secured by bond, and payable quarterly, on the 5th of *January*, the 5th of *April*, the 5th of *July*, and the 5th of *October*, was sold before the Master. The report was confirmed in *Michaelmas* term.

A motion was made by the purchaser, that he may be at liberty to pay his purchase-money into the bank, and that he may receive the annuity from the 5th of *July*, 1806. The question was, from what time the purchaser should be entitled to receive the annuity.

* 518

Mr. *Bell*, on behalf of the purchaser, insisted that he was entitled to receive the annuity from the day of the sale, paying interest from that time, the purchase of a subject of this fluctuating nature being with a view to the value at the time; and the report could not have been confirmed before the end of *October*.

Sir *Samuel Romilly*, for the parties entitled to the produce of the sale, observed that the rule, with respect to the sale of an annuity, is not settled. The rule upon the sale of a real estate, that the purchaser is to be let into possession from the quarter day preceding the purchase, paying in his money before the next quarter day, is not exactly applicable to an annuity: nor is the reason of that rule very intelligible. This purchaser never applied to pay in his money, since the sale in *August*, until the present month.

The Lord CHANCELLOR.

In Sir *Ashton Lever's* case,(*a*) the purchaser was considered as having the benefit of the purchase from the

(*a*) *Jackson* v. *Lever*, 3 *Bro. C. C.* [illegible]

time at which he agreed to have it; and in a late case, where part of the premises was burned,(b) I considered the purchaser as having the purchase from the confirmation of the report. That I think the reasonable rule for this case; and that the purchaser should pay interest from the very day, upon which he could have confirmed the report.

1807.
Twigg v. Fifield

(b) Ex parte Minor, ante, vol 11 p. 559.

*It was accordingly taken from the first seal before *Michaelmas* term. * 519

## THE ATTORNEY-GENERAL *against* DIXIE.

## BOSWORTH SCHOOL (EX PARTE.)

1801, Nov 16, 17. July 21 1802, Feb. 26 July 6. 1805, Aug. 26 27

Jurisdiction of the Court of Chancery in the case of abuse of a charity upon the receipt and management of the revenue by the governors, the visitor as heir of the founder, being generally one, and for a considerable time, while there were no governors, without authority.

The heir being a lunatic, the order vacating irregular appointments of governors, and a school master, and for filling up those offices, was made upon petition to the Lord Chancellor, as visitor.

Under the information, an inquiry and account were directed as to leases of the charity estate, without involving the charity in a general account to a remote period, and a general account of the more recent period, limited to the time when the information was filed; with costs.

THE information stated the foundation of the school of *Market Bosworth*, in the County of *Leicester*, under the will and codicil of Sir *Wolstan Dixie*, dated in 1592 and 1593, letters patent of Queen *Elizabeth*, and a decree in the reign of King *Charles* II. by which it was provided that the rector and churchwardens, for the time being, and in default of them, the Bishop of *Lincoln* should elect governors, (the rector and churchwardens to be of the number,) and that Sir *Wolstan Dixie*, and his heirs; and in default of heirs, the Bishop of *Lincoln*, should appoint the master and ushers.

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The information farther stated, that after the death of Sir *Wolstan Dixie*, the nephew and heir of the founder, the succeeding heirs assumed the entire management of the school, being the patrons of the Church, and owners of most of the houses and lands in the parish; that particularly, no governors had been *appointed from 1740 until the death of Sir *Wolstan Dixie*, the father of the defendants, Sir *Wolstan Dixie*, and *Willoughby Dixie*, in 1767; during which period, the rents and profits of the premises, belonging to the school, were received by Sir *Wolstan Dixie*, the father, and after his death, by the defendant, Sir *Wolstan Dixie*, until a commission of lunacy issued against him in 1769; and from that period the rents were received by his brother and committee, the defendant *Willoughby Dixie*. The information then stated various instances of abuse and mismanagement; that leases were made at small rents, with declarations of trust, for the daughters of Sir *Wolstan Dixie*; that the estates were underlet; that the surplus rents and profits, beyond the salaries of the master and ushers, had not been applied to the purposes of the charity; that *Willoughby Dixie*, had appointed to the office of head master *Joseph Moxon*, a person unfit to be master of a school, being a waiter in a public house, whom he afterwards removed; and appointed *William Wood*; that in 1789, the information having been filed in 1788, the rector and churchwardens, under the influence and controul of *Willoughby Dixie*, elected him and five other persons, also defendants, to be governors; all of whom were unfit for that office, as his tenants, or otherwise under his controul, and one a lessee of part of the charity estate, at an under value.

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The information prayed an account of the rents and profits received by the several defendants, and by Sir *Wolstan Dixie*, the father; that proper directions may be given for the application of the surplus rents and profits of the charity estates; and that the persons, appointed governors, may be removed, and proper governors appointed.

*Mr. *Sutton*, Mr. *Alexander*, and Mr. *Stratford*, in support of the information.

In a case of fraud, the length of time cannot form an objection to the account; and these circumstances do not afford any presumption of a settlement of accounts: nor are there any persons, to whom laches can be imputed. Those circumstances form the only ground upon which, after a considerable lapse of time, accounts are limited. There were no persons to settle the accounts for many years; and afterwards there were only nominal governors, appointed by Sir *Wolstan Dixie*, for the very purpose of evading the account. In such a case, clearly, the length of time can be no bar to the account.

Another objection will be to the jurisdiction; that where there is a charter, creating a corporation for the management of a charity estate, this Court has no jurisdiction to examine the management of the charity, by that corporation. But upon principle, and a great variety of authorities, no doubt can prevail as to the jurisdiction. First, upon the strict sense of these instruments, this Court is the visitor of this charity, excluding the heir of the founder. If that should not be the construction. 2dly. The general jurisdiction of this Court over trusts and charities, that has prevailed since the reign of King *Charles* I. will be maintained against persons, who are the governors, bound by duty to controul the management, having in them the legal estate, upon suggestion of actual mismanagement, or probability of it. In the reign of King *Charles* II. a decree was made upon this very charity; taking the management, and as it seems, appointing a receiver. The objection is raised upon the clause in the statute of charitable *uses;(*a*) declaring, that it shall not extend to any City or Town corporate, or to any lands within such City or Town, where there are governors appointed, nor to any College, Hospital, or Free School, having special visitors, governors, &c. appointed by the founder: the objection pro- * 522

(*a*) Stat. 43 *Eliz.* c. 4 s. 3.

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ceeding upon this, that this Court has no more jurisdiction, than the commissioners of the charitable uses had. The case of *Sutton Colefield*,(b) 11 *Charles* I. and another case,(c) 5 *Charles* I. shew that this proviso does not relate to the case where the governors have the legal estate. The other construction would place parties having the legal estate perfectly out of controul.

(b) Duke's Char. Us. 68

(c) *Hynshaw* v *The Corporation of Morpeth*, Duke's Char. Us 69

(d) *Eden* v *Foster*, 2 *P Wms* 325

(e) *The Attorney General* v *The Governors of the Foundling Hospital*, ante, vol 2 p 42

(f) Stat 43 *Eliz* c 4

But even upon the construction of the statute, the jurisdiction must stand: The case of *Birmingham School*,(d) followed repeatedly by Lord *Hardwicke*; and in the case of the *Foundling Hospital*,(e) Lord Commissioner *Eyre* says, where those, established as governors, having also the management of the revenues, are abusing their trust, this Court has jurisdiction. An information will be sustained at least in every case, in which a commission would issue under the statute of charitable uses,(f) the object of which was not to do away any jurisdiction, which this Court previously exercised, but merely to prevent the expense and trouble of coming here in certain cases, to which that act applied a less tedious and more easy remedy. The general description of breach of trust and negligence

* 523 *is explained, by putting distinct heads of misapplication and misgoverning, &c. In *Hynshaw* v. *The Corporation of Morpeth*,(a) upon the exception to the return of the commission, it is distinctly stated, that the commission is to be supported, as otherwise the party would be put to a Court of Equity, or Parliament: the commission therefore being considered as merely a more summary mode of proceeding, not as superseding the jurisdiction which this Court had before the act. But where there is a charter appointing a visitor, sufficient officers, and regulations for every case that may happen, upon which the government must necessarily depend, and to which resort must in the first instance be had, yet if the governor or visitor by his conduct involves himself in another character, his conduct in that new character may be the subject of inquiry in this Court. Notwithstanding the provision, that the visitor

(a) Duke's Ch. Us 69.

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shall not be within the statute,(b) in the case of *Sutton Colefield*,(c) it was held, that the visitor, placing himself in the situation of an ordinary trustee, taking upon himself, for instance, to receive rents and profits, is open to the investigation of this Court in that character, which he has assumed. The result also of the several resolutions in the case of *Birmingham School*(d) is decisive, that the governors receiving the rents and profits, must be visited by this Court; otherwise, as they cannot visit themselves, an abuse must be without redress.

(b) Stat 43 *Eliz* c 4.
(c) *Duke's* Ch Us 68
(d) 2 *P. Wms*. 325.

This case, however, does not depend upon general principle, and general authority. The nature of this foundation, and the transactions that have passed, make this Court the visitor. The proposed object of *the charter of incorporation, or letters of license, as it has been called, is to carry into effect the directions of the will, one of which directions is, that in case of misconduct of the governors, the heir at law shall apply to this Court. The will directs the heir who would without such direction have been the visitor, to visit in a particular way, through the intervention of this Court. In 1643 the application was made for letters of license, which passed, expressly referring to the will; giving power to the heir to make ordinances and regulations, and directing the *Skinners'* Company to appoint the masters. After those letters were obtained, the Company declining, under an application to this Court, a decree was made, giving those powers to the heir. Afterwards a question arose as to restoring the master to his situation, or as to waiving his qualification; and a decree was made upon that subject. Is it possible now to say, this Court has not jurisdiction in this particular case? * 524

The costs ought to fall upon the defendant, *Willoughby Dixie*, or at least to be apportioned among the defendants, so as not to fall upon the funds of the charity, upon such a case of abuse: the funds of the charity seized upon for selfish individual purposes, not the common case of extra-

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The *Solicitor-General*,(a) Mr. *Romilly*, and Mr. *Stanley*: Mr. *Richards*, Mr. *Hood*, and Mr. *Lewis*, for the different defendants.

(a) The Hon *Spencer Perceval*.

The first objection to the account is a defect of parties. The master, for the time is, by the will and
* 525 *letters patent entitled to the surplus of produce after the charges defrayed. The consideration is very different, whether length of time presents a legal bar to inquiry upon such a trust as this, and whether, though there may be no legal bar, the inquiry should be directed. The account and inquiry are not opposed; but the extent to which the account is to go is very material. Accounts and inquiries during the life of the late Sir *Wolstan Dixie* are pressed; with what view, and what is to be the application of the property, that may be recovered, are not stated; if for the benefit of the late masters, the representatives of those persons, who are to have the whole benefit of the account, ought to be before the Court. There is therefore a defect of parties, not only in that respect, but also for want of the representatives of the daughter of Sir *Wolstan Dixie*; in whose favour the lease was made. How is this account to be taken? How can justice be done? If there were no charges, incumbrances, or payments to be made by the trustee, his receipt might alone be sufficient to charge him. But the yearly outgoings bear a very considerable proportion to the actual amount. The Court has no means of ascertaining the payments made to the deceased masters for their salaries, what has been expended for repairs, &c. The answer swears, that no paper, containing any information of that sort, exists. From the difficulty of taking the account for such an extent of time it would not be expedient or just to direct it. No misconduct appears distinctly applicable to the period of the lunatic's management. If any leases were made during

that period, the consequences ought not to fall personally upon the other defendant. A lease, for instance, was found by him subsisting upon the *Loughborough* estate, which did not expire until 1783, from which time that estate was brought to account. There is no ground *for charging the defendant, not only in respect of his receipts, but according to the extended value upon the evidence. 1807

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The parties accused of fraud, have been long dead. Though, it is true, no statute of limitations applies to such a case, the Court refusing to go into an inquiry as to transactions that passed, at the distance of nearly half a century, proceeds upon the ground, that of necessity the inquiry must be *ex parte*, the case not completely before the Court, no person living who has any memory of the transactions upon which the charges of fraud and breach of trust are founded, standing upon written instruments not stated in the information, the charge arising in the first instance from the evidence. The Court cannot conjecture in what manner Sir *Wolstan Dixie*, if called upon, would have answered the charge. He might have shewn, that he had made satisfaction to the charity. The defendant has not voluntarily interposed in the management of these estates. He found himself in that situation, obliged to act, no governor being appointed; no one who would act except the churchwardens, mere annual officers.

If the founder of such an eleemosynary foundation, has not appointed a visitor, the heir at law is the visitor, and therefore the lunatic stood in that character. The law gives it to the heir, unless it is taken from him, which can be only an express appointment of the visitor; though not necessarily *eo nomine*. The passage referred to in this will cannot be considered a complete appointment of

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visitor. It is, not an appointment of the Lord Chancellor, nor a direction for any proceeding before the Lord Chancellor, as visitor, but merely a reference to the general jurisdiction of *this Court, that might be exercised equally by the Master of the Rolls.

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The will discovers no intention of appointing the Court of Chancery visitor; and there is considerable doubt, whether the most explicit direction in the will of a founder would have that effect. It may be supposed, the power devolves upon your Lordship, as private visitor, in the place of the lunatic: but then the application would be of a very different nature, as in the late case of *Richmond* School in *Yorkshire*, part of the corporation being made a distinct corporation for the purposes of that school; and upon a contest for the appointment of the master, a petition was presented to the Lord Chancellor, the school being of royal foundation. Such a visitor would have power to displace the governors, having full and absolute power to act *secundum æquum et bonum*, for the benefit of the charity, according to his private feeling, not controuled by technical rules.

As to removing the governors, this Court has never assumed an authority to remove a member of a corporation, even eleemosynary; as this is. Why cannot a fellow of a college be removed in the same manner? The case of the corporation of *Coventry* was considered as the common case of changing an individual trustee, not as a question upon removing any corporate governors. It would be very difficult to secure an election of persons, who would not be under the influence of this family, which is the principal objection.

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In the case of *Richmond School*,(a) in *Yorkshire*, the application was made by petition; and upon the *ground, that the Court of King's Bench had in the case of *The King* v. *St. Catharine's Hall*,(a) conceived that they had no jurisdiction. I have some doubt upon that part of this case. If the election, subsequent to the information filed, cannot stand, I have a doubt whether the application to controul or vacate the election is to be made to the Lord Chancellor in this way, or by petition in his visitatorial capacity: but then I would, as in the case of *Grantham* school, direct the cause to stand over, and the petition to come on with it.

(a) 4 *Term Rep.* 243

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(a) 4 *Term Rep.* 233.

Mr. *Sutton*, in reply.

Wherever the power of visitor is lodged, the jurisdiction of this Court, upon information by the Attorney-General for an account of the revenues of a charity, is not disputed. The objection is, that the representatives of the deceased schoolmasters and the daughters of Sir *Wolstan Dixie*, are not parties. The letters patent expressly provide, that the heir at law may make regulations as to the salary of the master, and other things, for the management of the school, and may vary these regulations, as might prove convenient; and that the surplus shall go to the sustentation of the school, or to the master and ushers. *Slade* was a schoolmaster, appointed by the heir, at a salary of 100*l.* *per annum*. Beyond that stipend he could have no right either at law or in this Court; nor is any claim made by his representatives. The same answer applies to the objection as to the representatives of the ushers; who also stipulated with the heir for specific salaries. As to the objection as it applies to the daughter of Sir *Woltan Dixie*, in respect of her interest in the lease, it is immaterial who are the persons, upon whom the trust property was lavished. *Upon a bill against an executor or trustee the objection was never made, that all the persons, deriving benefits from a breach of trust, * 529

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are not parties. The leases prove distinctly the breach of trust, charged by this information, by taking the revenues to himself, or applying them towards a provision for his family. It is very difficult upon the length of time to raise a presumption in his favour in such a case as this. It is admitted from the fact of the leases, that he considered himself entitled to the surplus. The objection is, that the account must be *ex parte*; Sir *Wolstan Dixie* not having kept any account. Can one breach of trust be used as a protection against the consequences of another? The election pending this suit was improper. It is idle to call it an election, by his own servants, and all except one, tenants.

Upon the objection of form, that a petition ought to be presented, according to the case of *The Attorney-General* v. *Grantham*, the information ought to be retained. But it is not clear, that the power of visitor is in the heir to the extent that is contended. He is not himself to assume the authority; but is to come to this Court. The will, pursuing the letters patent, making the heir himself one of the governors, is utterly inconsistent with the character of visitor. But the mode of redress is immaterial. Your Lordship has in some way a right to remove any one of the governors. In *The King* v. *The Master and Fellows of St. Catharine's Hall*(a) Lord *Kenyon*, governing himself by the case of *Philips* v. *Bury*,(b) lays down the distinction between a corporation for the administration of justice, with reference to the public police of the country, and an
*530 *eleemosynary foundation. In the latter instance the King visits through his Chancellor.

(a) 4 Term Rep. 233.
(b) 2 Term Rep. 346.

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It is not advisable to dispose of this cause entirely, till a petition shall be presented, to bring before me in another shape the question as to removing these governors: but I

should not do my duty, if I did not say, that in the administration of this charity abuses have been practised, which call for the most marked animadversion of the Court.

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The authority, according to the will given to this Court, is a special authority, applying to a particular case. The particular provision in the will having failed, by the refusal of the *Skinners'* Company to act, it naturally and legally devolved upon the heir at law. The crown properly, as it always does, took the heir's recommendation of the governors of the school. In this character of manager of the revenues unquestionably he became amenable to this Court; for, in his character of visitor he never could controul his own accounts. If the *Skinners'* Company do not nominate governors, or if their nomination cannot be considered a nomination *de jure* by implication the nomination is given to the heir at law; and, as to the schoolmaster, to the Bishop of *Lincoln*. The letters patent unfortunately did not look to the present case of lunacy. The question is whether the Bishop has the power of appointing the schoolmaster, or whether the committee has that power; which, I think, can hardly be contended; or whether the appointment of the schoolmaster is not in the crown. The circumstance of *Wood's* situation is to be considered. He has been appointed by the committee; and a question occurs, that is not brought *forward by this information, whether he is *de jure* schoolmaster; and whether it is expedient, if he is a proper person to be the master, to cloath him in a more effectual way with the character of master, than he at present has it. * 531

The letters patent are produced to prove the charge of misapplication, not in the common sense, merely by undue expenditure, but in corruptly retaining the rents and profits for the benefit of Sir *Wolstan Dixie*, or, as the information expresses it, of part of his family. The estates were let in 1656, and, at subsequent periods, long prior to 1753. The first letting was undue certainly; the te-

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nant being himself a governor. But there is a great difference between an undue letting, and a lease for the purpose of constituting himself tenant, that he may have the means of underletting at a great private advantage. The leases were undue also in this respect; that the chances of improvement in a lapse of time are to be taken; and are not to be prevented by leases enduring half a century. After the filing of the information it would have been more discretion to have thrown under the view of the Court, the election of governors, instead of its being made under such circumstances. From 1748, when an attempt was made to appoint new governors, no regular appointment took place, until after this information was filed; a quarrel taking place between the *Dixie* family and the rector. In 1753, Sir *Wolstan Dixie* knowing he was not the legitimate manager of this charity, and that the providence of this Court ought to have been thrown round it, the following transaction took place with *Dudley*, his instrument, and some others: a lease to *Dudley* by these governors, (who in truth were not governors, the office not being filled up,) for no less than 99 years, if the
* 532 three daughters *of Sir *Wolstan Dixie* should so long live, at a rent of 3*l.* less than the rent paid before, and a fine of 150*l.* with a declaration of trust indorsed upon it by *Dudley*. Another lease of the same sort was made.

It is said, the account upon an information filed in 1788, for I must consider it as taken then, against the estate of a man, who died in 1767, would not be beyond the authority of the Court, but it would not be directed with much discretion. It is one thing to say, that a general account shall be taken of all sums received; and another, that the Court may hold it manifestly due to justice, that some inquiry shall be made as to the actual application of all advantages acquired under these leases; and I cannot think, I carry the authority to an unwholesome length by saying, I will search to the bottom, the application of every thing made under those leases.

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At this moment I am not disposed to carry the account of the rents and profits, received by the late Sir *Wolstan Dixie*, farther than to get at that. There is charge enough for that inquiry; and, instead of charging the estate of Sir *Wolstan Dixie*, I only direct an inquiry, to see, what is finally right to be done; but if the result shall be, that any part has been applied in the family, that ought to have gone to the sustentation of the school, in any interpretation of that word, upon farther directions the Court will not feel any difficulty in saying, that must be considered as received by the order of Sir *Wolstan Dixie*, and therefore his estate shall be answerable for the amount.

The next period is that of the lunatic, about a year. The information, filed in 1788, did not produce the account of the rents and profits, received by Sir *Wolstan Dixie*, or the defendant *Willoughby Dixie*; but the amended and supplemental information does produce an *account; viz. the answer put in 1793. The appointment of the governors was in 1788. After the information filed, when there ought to have been no other payments by *Dixie*, viz. in *November*, 1789, a payment was made of eight years salary to the receiver; the answer stating the account, as concluded. The *Loughborough* estate was not accounted for from 1768 to 1783. I have no hesitation in directing the account in a larger form with regard to that period than that in which the late Sir *Wolstan Dixie* was living. It is said, the Court cannot do this. * 533

First, as to the jurisdiction. I was very soon satisfied as to the jurisdiction, if the corporation had been full, and had the management of the rents and profits. I say also, that it does not necessarily follow, because a commission of charitable uses would not issue, that therefore this Court could not act; and if it were made out, that the governors were merely nominal, and only the agents of *Dixie*, this Court would try to get at it. But here

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was no visitor in fact capable of acting; a person as committee of the lunatic is acting without authority for him as visitor; and till after the intimation filed there were not even nominal governors. Then, if the information was well filed, will the election pending the suit take away from the Court the jurisdiction, even if they were well elected? I think not; for the governors, if well elected, are trustees; and the visitor not being capable of acting, the jurisdiction of this Court must take place.

Then, the jurisdiction being clear, the next consideration is as to the manner of taking the account. Though the account in form must be directed, I do not think, the underletting since 1787 has been carried to that strict
* 534 degree of proof to make it wise to *prosecute the inquiry as to the rents, except as to those corrupt leases; for trustees of a charity are not bound to look with more providence to the affairs of the charity than their own A sufficient fair letting appears as to that period to shew, that an inquiry upon the ground of underletting would not be wise. As to *King* and the other tenants, if the probable result would be, that the rents had been sufficient, I should hesitate, whether I should not direct the account for the sake of the principle; for no trustee can be a tenant, and the Court will charge him with an occupier's rack-rent; and therefore if the difference of *King's* rent between six and eight guineas, were not too small to make it worth while, I should expressly declare that the ground. Besides that, *King* must quit the premises.

As to the other governors, men are not to put themselves in a situarion of responsible duty, and expect to be relieved even at the expense of those, who bring them into that situation. Therefore I do not think it would be unwholesome to serve them with the decree. As to removing the governors, it is very difficult to say, they are not to be removed; such an election of governors, compared with the duties required by the statute! The

only answer can be, that no other governors could be obtained; but the evidence is all against that. 1807.

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As to the consequence of removing the governors, the questions upon that require more consideration. Whether there should be a new election, or a nomination by the bishop, or the crown, and whether those who have so abused the situation of governors, shall be disqualified, I shall reserve, till after that petition shall have been presented. The relators must have their costs without doubt. It is too much to say, the *charity estate is to be redressed at the expense of those who seek to redress it. 535 The consequence would be, that all charities would be for ever liable to abuse without redress. The question then is, whether it is to be out of the estate of the charity. Much of it must be at private expense; whether all, or whether there may be exceptions, shall be reserved. As to the application of the surplus rents and profits, it is difficult now to allow Mr. *Dixie* the surplus rents and profits he has paid over, while the information was pending. He had no right to apply them pending the suit. I am not prepared to say, that under the large words as to the sustentation of the school, due regard being had to all the objects of necessity, all the surplus must go to the school-master. Upon that point also reserve the question until after the petition with regard to the removal of the governors.

A petition was accordingly presented, suggesting that the appointment of *Wood* to be master, was not a due appointment, and that he was not properly qualified; that the office of visitor is in either his Majesty or the heir of the founder; and is, in consequence of the lunacy of the heir, vested in his Majesty, and is to be executed by the Lord Chancellor; and praying a proper appointment of masters; that the persons chosen as governors, may be declared to 1802. *Feb.* 26.

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have been improperly chosen, and may be removed; that new governors may be appointed; that directions may be given for the future regulation of the school, and for the application of the surplus rents, &c.

536 Upon the petition, which was presented to the Lord Chancellor, as visitor, it was observed, that *the first object of it is the appointment of schoolmaster; which under the circumstances of this case, resembles a presentation to a living, the right of presentation to which is in a lunatic. That appointment is in the crown. The appointment has never been sanctioned by the license of the ordinary, which is always necessary, according to *The King* v. *The Archbishop of York*.(a) Lord *Kenyon* observes the effect of neglecting such schools. The result is, that this is a subject of ecclesiastical cognizance: and, without the authority of the ordinary, the appointment cannot take place. The requisites, pointed out by the statutes for the master of this school, are for the consideration of the ordinary.

(a) 6 *Term Rep.* 490.

The second object of the petition is, the appointment of governors. Your Lordship may, as visitor, remove governors, unduly or improperly appointed. There is abundant reason to remove them, upon the duties they have to discharge, the mode of their appointment, the qualifications required, &c. Under the circumstances there was no election; and the defendant is, in truth, sole governor. Your Lordship will not permit such a mockery to prevent the appointment of governors. Whether your Lordship, as visitor, will appoint governors, or leave it to the Bishop, may be a question.

A third consideration is, how the surplus rents and profits, beyond the salaries of the master and ushers, are to be applied. That surplus, pending this cause, has been paid to *Wood*, the schoolmaster; an application contrary to the express direction of the letters patent, and the statutes;

and of which there is no instance. *If the fund, the whole of which is given to the charity, increases so as to be more than is necessary, the proper course is a reference to the master as to a scheme for the application of the surplus. Any plan, tending to the advancement and improvement of the school, would answer the expression "for the sus-"tentation" of the school.

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In this case, three distinct periods are to be attended to: first, the acts of the elder Sir *Wolstan Dixie*, particularly with regard to the leases, require a declaration of the principles upon which his estate is to be answerable, and some particular directions. As to the time of the lunatic himself, there is not much for consideration; unless upon his permitting certain branches of his family to enjoy beneficially. That enjoyment, by sufferance, is, in a moral view, much less an object of censure, than the creation of such an interest. As to the present defendant, it is impossible to avoid expressing strong disapprobation of his acts; and with regard to more than one, the decree must contain a declaration of the sense the Court has of his conduct. Directions are also necessary as to the account. Perhaps no objection could be maintained against a general account as to the time of the father: but I think authority will bear me out in not involving the charity in a general account of the period during which he lived; and that I may confine it to the leases appearing to have been made by him. For the time during which the defendant, *Willoughby Dixie*, has had in a sense the general management, though the prosecution of such an account may not be useful, I do not know any principle upon which I can avoid directing a general account, *at least from the time of filing the bill. I believe great mismanagement has taken place; and that might be pressed with great force against the defendant, if it should be thought worth while, with

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reference to the delay, to go through that general account. The pleadings require that account to be directed generally; though that direction may be acted upon in a more limited manner.

As to the circumstances, the appointment of *Moxon* to be master was invalid: next, if the defendant had stood in a situation in which he could have made that appointment, it would have been an abuse of his powers. The appointment of *Wood*, must also be declared invalid; but with liberty to make any application for a due appointment to those persons who can make it. The prohibition from appointing any beneficed clergyman, is express and strong in the statutes; and the reason is explained, that the master shall not in this sense be called from the exercise of his duty, attending the scholars in his Parish Church; the statutes directing him to require them to furnish him with notes of the sermons.

As to the governors, the founder originally intended to reserve to his family a considerable influence; and that purpose was very proper in a moral view. But the conduct of the defendant has been such, that I do not know how to preserve that influence in his person; and if not, I do not know how it can be preserved in any degree. The election of governors, the subject of the supplemental bill, was a wrong and undue proceeding; as under the circumstances that election ought not to have been made, pending the cause, without leave of the Court. The situation in which some of the persons electing stood, calls for strong animadversion. Those governors cannot remain,
539 and I think the Court, under all the circumstances, *has power to remove them. Then are they to go to a new election? The objection is, that then the rector and churchwardens are to choose the new governors; and a doubt may be suggested, whether it is not to be considered as a default of those who were to elect, which would authorise the Bishop of *Lincoln*, under the charter,

or whether any other course is to be taken. Another consideration is, whether the interest of this charity will not admit of particular individuals being appointed governors *in futuro*.

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I have long been perfectly satisfied, that this Court has jurisdiction. This is not the mere case of a corporation, having visitors: but the visitor himself has generally been one of the governors; and the governors are acting as trustees in the receipt of the rents and profits of the estate. That is a sufficient ground. But there is another ground, that the interest, which this family have had with the rector, has not induced him so far to accede to their purposes as to keep the corporation alive. From the period of the dispute about the management, it does not appear to have existed as a corporation, until the governors were filled up under those circumstances. Then it is the case of persons, acting as to what does not belong to them within that corporate character, that would be necessary to lay the foundation of an objection to the jurisdiction. The corporation revived, therefore, could not possibly compel a due account for the time past, or a due application for that period, without the assistance of a Court of Equity; which therefore must have jurisdiction as to those persons, who acted in the intermediate period; not having vested in them that character, which alone could form the ground for an objection to the jurisdiction.

*I shall direct inquiries as to those leases, which Sir *Wolstan Dixie*, the elder, procured for the benefit of some of his family; and I shall make his assets liable, at least for the extent of what the charity has lost by the benefit they received. Upon the evidence that was done by his express direction and appointment: leases made, and declarations of trust for the benefit of his issue, who possessed under those acts. In the result of any suit in equity his estate ought first to refund to the charity that loss. I am not called upon to direct a general account. That ac- * 540

1807 The Attorney-General v. Dixie. count would be difficult and expensive, it is not clear, that the expense of it would fall upon his estate; and therefore it is doubtful whether it would be beneficial to the charity, if the expense of an account, to so remote a period, should be defrayed by the charity funds. The period of the lunatic's management is very short. As to the committee not saying whether it would be right to disturb the payments to the schoolmasters, and others, without a very strong ground, I think it due to principle and authority to declare, that the information must carry with it an account at least from the time when it was filed. The appointment of *Moxon* I must declare a most culpable abuse of the trust, if vested in the defendant. A division of the profit took place between him and *Wood*, by bargain. *Wood* also must be declared not to have been duly appointed. The defendant had imposed upon him a duty, not only to this school, but also to his brother, to preserve by proper conduct that influence which the founder intended to give to his family.

This estate has been treated too much as private property: manors, fisheries, &c. being reserved, which might be reserved; but that must be for the benefit of the charity.

* 541

1805 August 27. *The decree made in the cause, and upon the petition, declared, that under the circumstances of this case, the election of *Willoughby Dixie*, and the other persons, as governors, was invalid. The accounts were directed; and inquiries as to the charity estates, whether any, and what leases were made by Sir *Wolstan Dixie*, Sir *Willoughby Dixie*, or their father; at what rents? whether they were fair, or not; which were wholly for the benefit of the charity, and whether they were in trust for Sir *Wolstan Dixie*, the father, or the lunatic, or any, and what persons, relations of any of them. It was declared, that any lease of the charity estate, as far as it shall appear to be for the personal benefit of the grantor, or his representatives, or any

of his children or family, or any persons other than those entitled to the benefit of the charity, is an abuse in the application of the charity funds, for which such person, or his estate, is answerable; the relators to lay before the master a proposal for proper persons to be governors; an inquiry, whether *Wood* was duly appointed master; and if he was not duly appointed, or if he was an improper person, the relators to lay a proposal for the appointment of a schoolmaster; the master to state in whom the right of appointing the schoolmaster is, and a scheme for the future management of the charity.

18
The Attorney General
v
Dixie

## *COUSINS *against* SMITH. * 542

*April* 17.

Demurrer allowed to a bill for a discovery, and injunction against an action the effect being a contract for participation in an illegal transaction; the result of a combination of wholesale grocers, by the title of "the fruit club," acting by a select committee, of which the defendants were members, to purchase all imported fruit; though not strictly forestalling, regrating or monopoly

Persons contracting on behalf of a legal society, of which they are members, as a committee, are not liable to nonsuit, and cannot defend an action, upon an objection of parties.

THE bill stated, that the plaintiffs are wholesale grocers, and according to the usual course of the fruit trade, that article is imported in whole cargoes, to a much greater extent than sufficient for the supply of most of the persons employed in the wholesale trade, and in consequence of risk from the perishable nature of the commodity, and the heavy duties, with the prime cost, a society was many years since formed, and still subsists, by the title of the Fruit Club, under the management of a select committee, of which the defendants are members. That Club was instituted for the purpose of making purchases of imported fruits, and supplying the general trade, after deducting a reasonable profit to the members of the committee for their trouble.

The bill farther stated, that for many years past, the select committee have formed a scheme of getting into their

1807. Cousins v. Smith.

own hands the exclusive possession of the trade, and compelling all the wholesale dealers to apply to them for a supply; and have accordingly from time to time purchased the said imported fruits at low prices; and have afterwards resold to the members of the club, and other wholesale dealers, at very advanced prices, and in such quantities as they thought proper; and in case any merchant or importer should enter into any treaty for the sale of any cargo of fruit to any other person, without first making an offer to them, have refused to have any further dealings with them; and have made such threats to many importers of fruit; and have been enabled, by obtaining such command over the market, to raise or lower the price of fruit, as they pleased.

* 543 *The bill then stated, that the plaintiffs, who in 1802, when they entered into business, became members of the Club, having discovered these improper practices, in 1804 withdrew from the Club, and that, in 1805, they entered into a treaty for the purchase of part of a cargo, which treaty was broken off in consequence of an agreement by the chief owner of the vessel with the owner of another vessel, that both cargoes should be sold together. In consequence of that the plaintiffs, being unable to purchase the whole, and much in want of a supply, and unable to obtain a sufficient supply in any other manner, and conceiving that the owners had shewn a disposition to profit by the competition between the plaintiffs and the Fruit Club, to obtain an unreasonable price, entered into an agreement with the committee of the Fruit Club, offering not to oppose the committee in the purchase of the said cargoes, provided they would let the plaintiffs have a fourth part at prime cost. An agreement was accordingly entered into, but not reduced into writing; the Club became the purchasers of the two cargoes of fruit, and delivered certain parcels to the plaintiffs at certain prices, amounting in the whole to 815*l.* 3*s.* 8*d.* The bills of parcels were made out by the defendants, as agents and trustees of the

Fruit Club; and they were not themselves the sellers of the articles to the plaintiffs, or interested in any other manner than as members of the committee. Soon after the delivery of the fruit, the plaintiffs discovered that, though the committee were bound by the agreement to charge the plaintiffs no more than the prime cost, they had fraudulently charged a considerable profit to the plaintiffs, who refused to pay the whole. An action was brought for the whole sum of 815*l.* 3*s.* 8*d.* and the bill was filed, praying a discovery and injunction.

*To this bill the defendants put in a demurrer; insisting, for cause, that it appears by the bill, that the plaintiffs are not entitled to compel the defendants to discover the matters in the bill, or any of them. * 544

Sir *Samuel Romilly* and Mr *Roupell*, in support of the demurrer, contended, that the transaction, which was the subject of the bill, being illegal, the Court would not give any aid.

Mr. *Wetherell*, for the plaintiff, distinguished this transaction, the act of one individual, shrinking from a competition with the large body, called "The Fruit "Club," from a conspiracy of several dealers in the trade; insisting, that this could not be the subject of a criminal charge; being merely a waiver by one person of his right to bid; and comparing it to an agreement by two persons to purchase a pipe of madeira, instead of taking each a separate cask; which, though the effect is to deprive the vendor of some profit, could never be considered a conspiracy, or in any respect illegal.

1807.

Cousins v. Smith.

The Lord CHANCELLOR.

The first point upon this demurrer is, that if the discovery should be given, the defendant at law could shew other parties. There is nothing in that; for, where a legal body acts by committees, it is enough to consider the contract as made with those, who think proper to undertake, looking to the body for which they undertake for indemnity, and the plaintiffs at law cannot be nonsuited, nor could they defend an action against them, upon that ground.

* 545 *My opinion upon the transaction, as it is stated in this bill, is, that this is a case in which the Court ought not to assist the plaintiff. This transaction has been compared to the purchase by two persons of a pipe of madeira, but the transaction, stated by this bill, is a combination of the whole body of grocers in *London*, the effect of which is, that all persons, dealing in this article, are compelled to purchase upon the terms, dictated by this committee, having the means of buying up all the fruit, imported from all parts of the world, and holding this language, that those who do not buy from them exclusively, shall not have any supply. This is not, according to the legal definition of the term forestalling, much less regrating; still less monopolizing; but in the consideration of a Court of Equity, it contains the mischief of all three. First, there is a conspiracy against the vendors; next, a conspiracy against the world at large; enabling those persons to buy at any price they may think proper; and then, it is true, they can if they please, sell at a lower price than a fair competition in the market would produce; but it must also be recollected, that they can sell upon their own terms; and the manner, in which that discretion will probably be exercised is obvious. Then, as between these parties, the complaint is, that it is immoral in the defendants not to let this plaintiff have his bargain. In order to determine between them, I must look at the nature of

the bargain. The effect of the transaction is, that they are to be partners in purchasing these two cargoes of fruit. What is that but an agreement, that they shall be partners in a transaction, in which they know they are acting illegally. I have known cases of illegal insurance, where, if upon the account before the Master, they appear to have been affected by a greater number of persons than is permitted by the act of *Parliament(a) in favour of the chartered companies, those items were not allowed in the account; as the transaction, though right among the parties, was wrong with reference to the public.

Insurances, illegal within the Act 6 Geo. I. c. 18. s. 12 not allowed in an account before the Master

[* 546]

This demurrer must therefore be allowed.

(a) 6 stat. *Geo.* I c. 18. s 12



April 17.

## FIFE *against* CLAYTON.

Defendant to a bill for specific performance proving an agreement different from that insisted on by the plaintiff, may have a decree upon his answer, submitting to perform. A cross bill therefore, though formerly the course, being unnecessary, would be dismissed with costs.

THIS bill prayed the specific performance of an agreement for the sale of an estate to the plaintiff by auction; insisting upon the particular being general, without any exception, that the plaintiff was entitled also to a right of common; and that mere parol declarations by the auctioneer could not be admitted in evidence to contradict the particular. The defendant, however, resisting the bill, as to the right of common, proved, besides the parol declarations by the auctioneer, that previously to the sale the particular had been altered, by inserting an express exception of the right of common.

Mr. *Leach*, for the plaintiff, upon this evidence, proposed that the bill should be dismissed.

1807.

Fife v. Clayton.

Sir *Samuel Romilly*, for the defendant, insisted, that he was entitled to a decree for the performance of the agreement, as it was proved, without a cross bill; upon the authority of the late case, *Scott* v. *Stapylton*,(a) *where the Master of the Rolls dismissed the cross bill with costs; considering it unnecessary, as the Court would upon the answer have decreed a specific performance of what was the real agreement, and if this cannot be done, wherever the parties differ upon the terms of the agreement, considerable expense must be incurred by filing a cross bill, though perfectly unnecessary, the defendant submitting to perform the agreement.

(a) Ante, p. 426.

* 547

The Lord CHANCELLOR.

The old course required a bill and a cross bill. But I am willing to follow a precedent that will save that expense, and is right upon principle, the plaintiff, by his bill, offering to perform the specific agreement, which he represents.

A specific performance was decreed, with costs.



## KIRKHAM *against* CHADWICK.

ROLLS. *April* 27, 28.

A renewable lease not inconsistent with a covenant to let and manage to the best advantage, with reference to the subject, a trust for creditors. Distinction as to a charity estate, let upon a long lease.

BY indenture, dated the 17th of *June*, 1781, *Edward Chadwick* demised to *Joseph Boldon*, his executors, &c. various premises, to hold for the term of 84 years, at the annual rent of 120*l*. and subject to payment at the end of every 21 years of a fine of 21*l*.

1807.
Kirkham
v
Chadwick.

By indentures of lease and release, dated the 14th and 15th of *December*, 1781, the demised premises, among others, were conveyed by *Edward* and *Thomas Chadwick* to trustees, their heirs and assigns, to hold to *them, their heirs, executors, administrators and assigns, during the lives of *Edward* and *Thomas Chadwick*, and the survivor, upon trust, that the trustees, or the survivor, his or their heirs, executors and administrators, should from time to time set, let, and manage, the estate and premises, to the best advantage; and to apply the yearly rents, issues and profits, arising therefrom, as the same should arise and be made, among the creditors in satisfaction of their debts, as therein mentioned; with power upon the death or resignation of one or two trustees, for the survivors or survivor to appoint new trustees, until the trust should be satisfied.

* 548

By indentures, dated the 26th of *October*, 1783, the trustees and *Edward Chadwick*, demised to *Ralph Kirkham*, in whom a term, granted in *March*, 1781, for 34 years, was by assignments vested, his executors, &c. to hold for the term of 21 years, subject to payment to the trustees, their heirs and assigns, during the life of *Edward Chadwick*, and after his death to the persons entitled in remainder on the determination of the said term of 21 years, of the yealy rent of 120*l.* and a fine of 21*l.* upon the day therein mentioned to the person for the time being entitled in remainder. *Thomas Chadwick* also was a party to this indenture; which contained a covenant on the part of *Edward Chadwick* to renew the said lease, and also on the part of *Thomas Chadwick*, that he, his heirs, executors, and administrators, would from time to time during his life, and after the decease of *Edward Chadwick* without issue, at the request and costs of *Kirkham*, his executors, &c. and the surrender of that, or any future lease or leases to be granted in pursuance of the covenants in such indentures contained, or any of them, by himself solely,

1807.

Kirkham v Chadwick

or jointly, with other persons, grant *and execute to *Ralph Kirkham*, his executors, administrators, and assigns, a new indenture of lease for the term of 21 years from the making of such renewed lease; in and by which renewed lease should be contained the same rents and covenants for renewal, and other covenants, as were in the said indenture contained. The trustees also severally covenanted for themselves, and their several heirs, executors, and administrators, from time to time, (as far as they or any of them lawfully could,) to join with *Edward Chadwick* and *Thomas Chadwick*, respectively, in granting such new leases, to contain the same rents, covenants, &c. and it was agreed, that the yearly and other rents, reserved by the lease of *March*, 1781, should cease, and the parties should be discharged from the covenants of that lease, during the continuance of the covenants of this or any future lease.

By indentures, dated in *June*, 1801, *Edward* and *Thomas Chadwick* conveyed all their respective interests in the premises to *John Tasker*, the surviving trustee, under the deed of *December*, 1781, and *Thomas Tasker*, his son and heir at law, and appointed by him a co-trustee, upon trust to sell for the benefit of the creditors of the *Chadwick* family; with a covenant by *Edward* and *Thomas Chadwick* upon coming into possession to execute their powers of leasing, as the trustees should direct.

*Edward Chadwick* died without issue. The bill was filed under the will of *Ralph Kirkham* against *Thomas Chadwick* and *Thomas Tasker*, the surviving trustee; claiming a specific performance of the covenant for renewal, alleging expenditure by *Kirkham* in reliance upon it. Under a settlement, executed in 1774, *Thomas Chadwick*
* 550 was tenant for life of the premises, with limitations *to his first and other sons in tail; and the reversion to himself in fee. That settlement gave a power of leasing, not

exceeding 21 years, to the person in possession, reserving the most improved rent, and taking no fine. 1807. Kirkham v. Chadwick.

The defendants by their answer submitted, that they were not bound to renew.

The MASTER of the ROLLS.(a)

(a) *Ex relatione.*

*April* 28.

The principal question is, whether the defendant, the trustee, is not obliged to join in this lease. It is contended that he is not to be compelled to join; as the covenant in question is in breach of his duty; insisting, that the covenant for renewal is inconsistent with the covenant in the deed of trust, and therefore ought not to be performed; I see no reason why *Chadwick* ought not to perform it. As to the defendant, the trustee, he says, that this covenant is to the prejudice of the covenant to let and set to the best advantage. The question is, whether the proposition is made out, that the covenant was in breach of his trust. It has been compared to the familiar case of charity leases, where trustees have let the premises improvidently upon long leases, and where it is presumed, they have done wrong by granting such leases.(b) The analogy does not hold; the principle, as appliep, is totally different from, and directly opposite to, that which must govern the present case. A trust for a charity is always of a permanent nature, and generally calculated for perpetual endurance. This is a temporary trust. *Trusts of this kind are generally short. Creditors hardly ever expect, that such a trust as this should endure for more than 21 years. It was their interest to get the highest rent for 21 years; and at the granting of this lease, they looked to the circumstance of present advantage, and are not to be supposed to have looked to a subsequent period. The trustee, making a long lease, evidently goes beyond the purposes of the trust. What have the creditors to do with the mode in which the estate is to be let, * 551

(b) *The Attorney-General* v *Green, ante,* vol 6 p 452. *The Attorney-General* v. *Owen, ante,* vol. 10 p 555.

1807.
Kirkham v Chadwick

after their debts are paid? Had they been told, that they might let this estate at a lower rent without the covenant of the renewal, they would have rejected it, and desired to get highest rent they could, looking to their present advantage. The question is, whether it was a fit covenant at that time? The defendants should have shewn that it was not so. It must be recollected, that all parties then concurred: whence it is fair to presume, that it was a covenant not prejudicial to the creditors at that period. There is no evidence that it was prejudicial to them. It was objected, that from the present increased value of the premises, it must now be deemed a prejudicial covenant: but the present value, that can possibly be made, shews nothing. Consider how this property is circumstanced. There still exists a lease for 84 years; which may attach upon this property. *Chadwick* may execute his power: what interest has the trustee? Nothing but an interest during the life of *Chadwick*. It would be a hazardous interest for any person but the plaintiff to take a lease. I doubt whether any person would give the extended value: or lay out money in improving premises so circumstanced. The plaintiff however stands upon different ground, as she knows what to calculate upon to a certainty; looking to the term of 84 years, and therefore in that situation it is idle to talk of
* 552
what the present value is. Besides, it is not *in evidence, whether there is any creditor now in existence, by whom the trustee *Tasker* would be liable to be called upon. *Tasker* seems therefore to have failed in his objection. Decree a specific performance, with costs, as against *Chadwick*, and without costs, as against *Tasker*.

1807.
April 29.

## BROWN *against* HARRIS.

Jurisdiction of a Court of Equity upon a bill by officers of the army and the East-India Company, on behalf of themselves and all others &c for an account of prize money received, beyond the due proportion, and for a distribution according to the King's grant and usage; considering the defendants as trustees.
But upon the construction of the grant, as not creating a trust, a demurrer was allowed.

THE bill, filed by *Archibald Brown*, a Colonel in the service of the *East-India* Company, and also a Colonel by brevet in his Majesty's service, and by some other officers in the service of his Majesty and in the *East-India* Company, on behalf of themselves and the other officers and privates of the united and conjunct force of his Majesty and the Company, who were employed in the war against the late Tippoo Sultaun in the *East-Indies* in the year 1799, stated, that by letters patent, 31 *Geo.* II. his Majesty granted to the *East-India* Company, their successors and assigns, all such booty or plunder, which since certain former letters patent, granted to the Company, had or should be taken from any of the enemies of the Company, or any of his Majesty's enemies in the *East-Indies* by any of the ships or forces of the Company; provided, that the said plunder should be taken during wars carried on by the forces raised and paid by the Company alone, or by the ships employed at their sole expense; saving his Majesty's prerogative to distribute the said plunder or booty in such manner and proportions, as his Majesty should think fit, in all cases, where any of the forces by land or sea of his Majesty, his heirs and successors, should be appointed and commanded to act in conjunction *with the ships or forces of the Company. *553

The bill farther stated, that in the war against the late *Tippoo Sultaun* in 1799, the army was composed of his Majesty's, the Company's, and the *Nizam's* forces, under the command of the defendant Lieutenant General Harris, as commander in chief; and very large booty and plunder were taken, particularly at the capture of *Seringapatam*, in *May*, 1799; and that, after setting apart one-fourth part for the *Nizam*, the remaining three-fourths were, in *September*, 1799, divided and distributed by General *Harris*,

1807.

Browm v. Harris

and the other defendants, Generals *Floyd* and *Stuart*, among the defendant General *Harris* and the general and other officers, soldiers, and forces, of which the said united army was composed.

The bill also stated, that the plunder, being taken by the said conjunct army of his Majesty, the Company, and the *Nizam*, acting in alliance with the Company, ought not to have been divided and distributed without his Majesty's grant: his late Majesty having by his letters patent saved his prerogative to distribute the plunder in such manner and proportions as his Majesty should think fit, in all cases, where any of the forces by land or sea of his Majesty, his heirs and successors, should be appointed and commanded to act in conjunction with the ships and forces of the Company.

The bill then stated, that a memorial was presented by the Company to his Majesty, representing the matters aforesaid; and, that in the late war against *Tippoo Sultaun*, considerable booty and plunder had been taken in expedi-
* 554 tions, in which his Majesty's forces *had been employed conjunctly with the forces of the Company: but the whole expense of such war had been borne by the Company; and, that upon former occasions of wars in *India*, in which his Majesty's forces and the forces of the Company had been employed conjointly, his Majesty had been usually pleased to grant the booty and plunder, taken in such wars, to the Company, as to one moiety thereof for their own use, towards their own expenses; and the other moiety in trust to be by the said Company, or by those whom they should appoint, divided among the commanders, officers, and men belonging to the forces employed in such wars. The memorial farther represented, that all, or the largest part of, the plunder, taken in the late war, except the artillery and stores, had been appropriated and divided, without any authority from, or privity with the Company, by the commander and officers, among his Majesty's forces and the

1807. Brown v. Harris.

forces of the Company, and to the use of the *Nizam*, for the benefit of his Highness and his forces, engaged in the war; and prayed, that his Majesty would confirm the appropriation of such part of the booty and plunder, which had been already made; and direct, that the division of such part thereof as had been appropriated to the use of the commander, officers and forces, of his Majesty and the Company, should be made conformably to the usage theretofore practised in like cases; and grant to the Company all the residue of the said plunder and booty, and the artillery and military stores; to hold to the Company and their successors, as to three-fourth parts thereof; and as to the remaining fourth, to be accounted for to the *Nizam*.

The bill further stated, that by letters patent, 22d *November*, 41 *Geo.* III. his Majesty granted and confirmed *unto his forces, and the forces of the Company, and the *Nizam*, for the benefit of himself and his forces, all such part of the booty and plunder, taken in the war with the late *Tippoo Sultaun*, (except the artillery and stores,) as had already been appropriated and divided by the commanders and officers, engaged in said war, among said forces and the *Nizam*; to have and to hold the same to his Majesty's said forces, and to the forces of the Company, and to the *Nizam*, for the benefit of himself and his forces, engaged in said war, (except as before excepted,) in as full, large, ample, and beneficial manner, as if the same had been originally granted by his Majesty for their benefit respectively; and his Majesty thereby granted unto the Company and their successors, according to the usage recited, all the residue of said plunder and booty, and the artillery and military stores, taken in said war; to have and to hold unto the Company and their successors, as to three-fourth parts thereof, for their proper use and benefit; and as to the remaining fourth part thereof, for the benefit of the *Nizam*, and his forces; and to be accounted for to his Highness by the Company. * 555

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The bill further stated, that besides the defendant, General *Harris*, the commander in chief, there were six other general officers in the said united army; and that by the distribution of the remaining three-fourth parts of the plunder, made by the defendants *Harris*, *Floyd*, and *Stuart*, one whole eighth, amounting in sterling money to 129,962*l.* 16*s.* was allotted to the defendant, General *Harris*, as commander in chief, and the sum of 14,400*l.* was allotted to the defendants General *Stuart*, and General *Floyd*, and 10,800*l.* to the other four general officers, that the said division and distribution were not conformable to usage; and by which General *Harris* received 64,961*l.* 4*s.* more than he ought to have received, *Generals *Floyd* and *Stuart*, 3,569*l.* 15*s.* 4*d.* more than they ought to have received: but the sums allotted and paid to the other four general officers, were less than they ought to have received by 30*l.* 4*s.* 8*d.* each. The bill charged, that the said distribution, if made by a committee of officers, as pretended by the defendants, was not fairly and properly made, nor in such shares and proportions as are conformable to usage, that in all cases, where there has been but one general officer commanding an army, he has received, according to usage, one eighth of the plunder: where two general officers, the senior has received two thirds of an eighth, and the other the remaining third, and where there have been three or more general officers, the commanding officer has received one half of an eighth, and the other half has been divided among the other general officers, that the constant usage has been for all the general officers, employed together in one army, to receive among them one eighth of the plunder, and that such usage is conformable to his Majesty's proclamation, dated the 17th of *April*, 1793, regulating the distribution of prize-money in his Majesty's navy: that the grant of his Majesty does not operate to confirm the distribution in all events; but only so far as made according to usage.

* 556

The bill prayed an account of the sums received by the defendants for their shares, beyond the proportions they are respectively entitled to by usage; and that they may refund; in order that a distribution may be made among the plaintiffs, and the other officers and privates, of the said united and conjunct army, according to his Majesty's grant, and the usage in like cases.

*To this bill, the defendant, General *Harris*, put in a demurrer to the discovery and relief. A similar demurrer was also put in by the defendant, General *Stuart*. General *Floyd* was out of the jurisdiction. * 557

Mr. *Richards*, Mr. *Hart*, and Mr. *W. Agar*, for the demurrer.

Sir *Arthur Piggott*, Sir *Samuel Romilly*, and Mr. *Wyatt*, in support of the bill.

The Lord CHANCELLOR.

In these causes, the rights of the parties must turn upon the construction of the instrument. The bills are filed by officers of the King's army, and of the *East-India* Company, on behalf of themselves, and the other officers and privates of the united forces of his Majesty and the *East-India* Company, who were employed in the war against the late *Tippoo Sultaun* in the *East-Indies*, in the year 1799; stating the grant of his late Majesty; the effect of which is to regulate the distribution both between the classes and the individuals composing them, as his Majesty could before the prize act, in the exercise of his prerogative, regulate it with reference to both those objects.

The bill then states the distribution of a large part of the plunder, which is particularly described afterwards in the bill, contrary to the usage, according to the letters patent

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of the late King; saving his Majesty's prerogative to distribute the plunder and booty in such manner and proportions as his Majesty should think fit, in all cases where any of his Majesty's forces, by sea or land, should be appointed to act in conjunction with the ships and forces of
* 558 the Company. The prayer *of the bill insists upon the jurisdiction of this Court, to consider the defendants as trustees.

Upon the demurrer to this bill, I cannot bring myself, if the effect of the grant is properly stated, to say, the Court has no jurisdiction; for whoever are the parties, and whatever may be the inconvenience, the effect is, that those who hold the property, hold it upon a trust for those who are entitled to it; and the Court must take the jurisdiction, unless it is shown that there is no jurisdiction; or that there is a jurisdiction elsewhere. The jurisdiction has been held in cases just as complicated: for instance, the case of prize agents, holding the property.(a)

(a) *Good* v. *Blewitt, ante,* 397.

Consider then the effect of the letters patent; stating the usage of the crown to grant the booty and plunder, taken in such wars, to the Company, as to one moiety thereof for their own use towards their expenses; and the other moiety in trust, to be by the Company, or by those whom they shall appoint, divided among the commanders, officers, and men, belonging to the forces employed in such wars; representing, that it was the usage of the crown not to point out the shares and quotas, in which the officers and others respectively should take that moiety, but to grant the whole in two moieties, one to the Company, to be retained by them towards their expenses, the others also to the Company, to be distributed by them, or the persons they should appoint, among the commanders, officers, and men, and leaving open the consideration, whether the distribution would not be more properly made by them,
559 with reference to the *consideration of merit and demerit, than if the crown were itself to distribute.

The prayer of the memorial, presented to the crown by the *East-India* Company, is, that his Majesty will be pleased to confirm the appropriation, already made without authority; and to direct, that the division of such part thereof, as had been appropriated to the use of the commanders, officers, and forces of the Company, should be made conformably to the usage.

I construe that as having reference to the former part of what is stated in the memorial; meaning only that it was the prayer of the Company, that his Majesty would substitute that sort of division they meant to have sanctioned, and the appropriation they desire to have confirmed, instead of that which would have taken place under the usage; if his Majesty had granted according to the usage above stated, in moieties; one to the Company, to be retained by them towards their expenses; the other also to the Company, to be distributed by the Company, or those whom they should appoint, as here stated.

Whatever the consequences may be, the Crown has not gone far enough by these letters patent to create those rights in the individuals, forming the whole of the class of persons, who are represented by these plaintiffs, which would make them *cestuis que trust*, with a title to such disposition of the property among them respectively, as this bill supposes they may have.

If I am wrong in that construction, if they have a right to the property in other hands, I repeat, that the Court has jurisdiction.

The demurrers were allowed.

1807.
April 30.

## *HEWITT *against* M'CARTNEY.

Mortgagor, defendant to a bill of foreclosure, being in contempt, cannot obtain the reference on motion under the statute.

(a) Statute 7 Geo. II. c. 20.

THE bill prayed a foreclosure. The defendant had appeared, but had not put in an answer, and having stood out all process, the cause was set down in the regular course, for the purpose of taking the decree *pro confesso*. The defendant, under those circumstances, moved for the usual reference under the statute,(a) to take the accounts; offering to pay what should appear to be due.

Mr. *Heald*, for the plaintiff, under these circumstances, and the defendant being in contempt, opposed the motion.

Mr. *Fonblanque*, for the defendant, insisted that a mortgagor has this right under the statute; and the Court has no discretion; distinguishing the case of contempt from outlawry; in which situation, certainly a Court could not hear the party, making any claim.

The Lord CHANCELLOR.

I disavow all discretion, except a judicial discretion. but I cannot put this construction upon the statute; that a party in contempt can claim the relief given by it as if he were not in contempt. The effect of the contempt, according to the law of every Court, is, that the defendant cannot come in upon this motion.

No order was made.

1807.

Rolls. April 30.

Effect of a deposit by vendee, with notice to vendor to stop or determine the rate of interest: not as a tender and appropriation, transferring the risk as to the principal. Therefore upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's.

## *ROBERTS *against* MASSEY.

THE bill prayed the specific performance of a contract for the purchase of an estate from the plaintiffs, at the price of 12,000*l.* The plaintiffs not being prepared to make the title at the time appointed, the defendant gave them notice that he had paid the money into a bank, where it was not producing interest; and that he would not be answerable for interest. Afterwards he invested money in the 3 *per cent.* consolidated bank annuities, when they were at 50; giving notice of that also to the plaintiffs, who returned no answer for two years and a half; when the funds having risen to between 60 and 63, they signified their assent, and claimed the stock upon making out the title to the estate. The defendant submitting to take the estate, insisted, that the plaintiffs were entitled only to the purchase money with interest.

Mr. *Richards*, and Mr. *Owen*, for the plaintiffs, contended, that the investment of the money amounted to a tender and appropriation; and that, if the event had turned the other way, the loss must have fallen upon the plaintiffs.

Sir *Samuel Romilly*, and Mr. *Benyon*, for the defendant, denied that, and insisted, that as the loss must have fallen upon the defendant, the benefit must be his.

The MASTER of the ROLLS.

It does not appear to me, that this has the nature of a tender. The intention was not that the money *was to be accepted; or that the defendant should part with it; for the conveyance was not ready. The money was to be *562

1807. Roberts v. Massey.

paid over only when the conveyance was made: the purpose of depositing the money was merely to stop interest. That is the only effect of the deposit, and that effect it would have had; that if the money was ready at the day, the defendant, giving notice, which is required in some cases, and the vendor not being prepared to make a title, or a sufficient conveyance, interest should not run from that time. But I never knew that a deposit had any other effect; that it imposed a liability, or a responsibility upon the party, to whom that notice was given, throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He cannot by depositing the money with his bankers throw the risk of their credit upon the other parties. They are not called upon to express their opinion of that bank, or to say any thing upon the subject. There is no difference between that and a deposit at the bank of *England*, or a conversion of the money into stock; as the one party has no more right to make the other consent to have the fund laid out in stock, than in a private bank. Suppose a loss had happened, and the defendant attempted to throw the loss upon the plaintiffs; could he do so? They would have said, he gave them notice of a purpose and intention, not theirs, but his own. He puts it so. He does not put it as having consulted them upon the propriety of the act. They would have asked what business they had with his intention; what obligation notice of what he resolved to do, could impose upon them? They would have said, he could not impose upon them even the duty of dissuading him, and of stating the consequences; all that is for him to judge of. The defendant accordingly professed to judge
* 563 of it himself. *Not receiving an answer, he still proceeds to invest the money in stock. It would therefore have been absolutely impossible for him, if the stock had fallen, to throw the loss upon the plaintiffs; and the converse is a necessary consequence; that an advantage having arisen, it is impossible for them to claim the advantage. As the risk was his, the benefit also must be his.

The decree was made accordingly for a specific performance.

1807.
Roberts v. Massey.

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## OGILVIE *against* HERNE.

Rolls May 4.

A decree, taken *pro confesso*, in the ordinary course, after appearance, not under the statute 5 *Geo.* II. c. 25 can be impeached, as any other decree, only directly, by a bill of review, or a bill to set it aside for fraud, not collaterally by an original suit, seeking a decree, inconsistent with it. Such a bill therefore dismissed with costs.

THE bill prayed a general account of all dealings and transactions between the plaintiff and the defendants; who had been concerned for the plaintiff as his Solicitors; and that the defendants may be decreed to deliver up securities, obtained by them, for an illegal balance of 1,200*l*.

The defendants by their answer insisted upon three stated accounts, delivered upon the 9th of *August*, 1793, the 5th of *May*, 1794, and the 17th of *July*, 1795. In *April*, 1799, the Master made his report under an order, obtained by the defendants, for taxing their bill of costs. The defendants afterwards delivered their subsequent final account, which was approved and settled by the plaintiff, who executed a bond for the balance, in *August*, 1800, and other securities. In 1803, the defendants filed a bill to obtain the benefit of their securities; to which the plaintiffs put in an appearance; but, residing at *Holyrood-House* in *Scotland*, *never put in an answer; and upon the 14th of *February*, 1806, a decree was pronounced at the Rolls, that the bill be taken *pro confesso*; and directions were given accordingly.(*a*) The defendants insisted upon the decree in the former suit, as a bar to this suit. * 564

(*a*) *Herne* v. *Ogilvie*, ante, vol. 11. p. 77.

Mr. *Hart* and Mr. *Heald*, for the plaintiff.—Sir *Samuel Romilly*, for the defendants, took the objection that the plaintiff could not be permitted to go into the cause.

1807

O'Kane v. Horne

The MASTER of the ROLLS.

In this cause, the plaintiff cannot possibly go into the merits. The decree, obtained upon the bill, taken *pro confesso*, is just the same as any other decree of the Court. The consequence is, that it cannot be impeached collaterally; but must, like every other decree, be impeached directly, upon a bill of review, or a bill to set it aside for fraud. Where is the injustice of not permitting the defendant, against whom such a decree has been made, to proceed collaterally. It is the effect of his own obstinacy, not putting in his answer. He desires to do now, what, I must take it, he wilfully and obstinately did not do before. Either he was, or was not, in possession of all that he now knows. If he was in possession of all he now knows there is no pretence for any indulgence; if he was not, if any thing has since come to his knowledge, any new evidence, laying a ground for impeaching the account, that is the foundation of a bill of review to impeach the decree. Therefore *quacunque viâ* there is no pretence for this bill. The effect would be two inconsistent decrees, in opposition to each other. A decree upon a *bill, taken *pro confesso*, according to the ordinary course of the Court, is perfectly different from a decree under the statute.(*a*) In the former case, as at common law there can be no judgment against a man without appearance, though the plaintiff may proceed to outlawry, so here you may have all sorts of process, but you cannot have a decree. But when the statute interferes, to enable the plaintiff to obtain a decree without an appearance, the statute prescribes the rules by which that object is to be obtained.

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(*a*) Statute 5 Geo. II c. 25. See *Geary* v *Sheridan*, *ante*, vol 8. p 192.

This bill must be dismissed with costs.

1807.

# THE ATTORNEY-GENERAL *against* GRIFFITH.

May 1. 5

A long lease of a charity estate, in 1760, set aside, the trustees joining in the application, as a breach of trust, not only as against the express directions of the founder, but also generally, as an improper administration of a charity estate, the relators not desiring to disturb under leases. The account was confined to the filing of the information, or previous demand.

Such cases to be marked with costs.

THE information stated the foundation of the charity, under a decree, in the second year of King *Charles* I. directing a trust as to the rents and profits of real and personal estate for *Henry Smith*, the plaintiff in that cause, for life, and for such charitable uses, and otherwise for the benefit and relief of his kindred, as he should appoint; and that the trustees, or seven of them at least, and their heirs and assigns, should after the plaintiff's decease, dispose of the rents, issues, and profits, to certain charitable uses, and such other charitable uses as he by his will, *or any writing, to be sealed and delivered in the presence of three witnesses, should appoint, and, in default thereof, to such charitable uses as should be declared by the trustees, or any seven of them.

By a deed poll, dated the 26th of *January*, 1626, *Henry Smith* directed, that such leases or estates, as should be made or granted of the lands and premises therein mentioned, should not exceed the term of 21 years, or three lives in possession; and so as the said lands, so to be letten, should be in the best manner that might be, letten at the best improved yearly rents, and not for great fines and small rents, except for copyhold lands, which might be granted on fines.

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*Henry Smith*, by his will, dated the 24th of *April*, in the third year of King *Charles* I. gave and bequeathed for the use of the poor captives, being slaves under the *Turkish* pirates, 1,000*l.* to be laid out in the purchase of lands of inheritance of the value of 60*l. per annum* at least. He also gave for the use and relief of the poorest of his kindred, another sum of 1,000*l.* to be laid out also in the purchase of lands of inheritance: the rents and profits of both estates to be distributed among

the respective objects at the discretion of his executors, and their heirs, and of the survivor, and of the Lord Mayor and Sheriffs of *London*, for the time being.

By indentures, dated the 28th of *June*, 16th *Charles* II. the trustees of the lands, purchased with the several sums of 1,000*l.* and 1,000*l.* in consideration of the rents and covenants, and of the sum of 500*l.* laid out by *Christopher Blake*, in building and improving, and of his releasing his title to several of the lands, demised to him seve-
* 567 ral premises in the parishes of *Chelsea*, **Kensington*, and *St. Margaret's*, *Westminster*, for a term of 70 years, at the yearly rent of 130*l.*

The information farther stated, that the lease to *Blake* expired in 1734; and previously to the expiration of the lease, the premises, upon inquiry, appearing to be worth the rent of 250*l.* *per annum*, an agreement was entered into on the 31st of *May*, 1731, between the trustees and *Francis Calloway*, assignee of *Blake's* lease, for a lease at that rent; and an entry was made in the minutes of the meeting, that a lease should be prepared accordingly: but it does not appear that any lease was prepared; on the contrary, the trustees in 1735, upon the expiration of *Blake's* lease, directed a revaluation of the premises to be made; and in 1740, declared they were willing that the agreement with *Calloway* should be cancelled, and that they would grant him a lease for 21 years, at the rent of 200*l.* *per annum*, to commence from the expiration of the lease of the 16th *Charles* II. with a special covenant to restrain him from digging brick earth, and the usual and common covenants; and it does not appear that any lease was ever made to *Calloway* upon such terms, as aforesaid, though he was in possession as tenant to the trustees.

The information farther stated, that on the 6th of *August*, 1744, at a meeting of the trustees, it was ordered, that notice should be sent to *Calloway*, to pay his arrear of rent, or distress would be made. On the 25th of *July*, 1749,

the trustees ordered that a lease should be prepared, pursuant to a contract made with Calloway and William Bucknall, Doctor in Physic; and by indenture of lease, dated the 8th of *May*, 1730, all the premises, contained in the lease of the 28th *June*, 16th *Charles* II. were demised to *William Bucknall*, under *the particular description of "the premises, which by indenture of lease, bearing date "the 21st *June*, 16th *Charles* II. had been demised by "the then trustees of the said *Henry Smith*, to *Christopher Blake*, for the term of 70 years;" to hold the same from *Lady-day* then last past, for the term of 21 years, at the rent of 170*l.* *per annum*, for the first ten years, and 200*l.* *per annum* during the remainder of the term; and no beneficial covenants on the part of the lessee were contained in said lease, but only the usual covenants for keeping the premises in repair.

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Griffith.
* 568

In 1755, a large arrear of rent was due from Dr. *Bucknall*; who at a meeting of the trustees, promised to pay by instalments: but in 1759, an arrear of 872*l.* 10*s.* 0*d.* being due, he presented a memorial, representing, that from the neglect of *Calloway* to repair, and his conduct in other respects, the premises were in a very bad condition, and the rental reduced; and praying that some abatement might be made in his rent; or that a lease might be granted to him upon the same terms as had been granted to *Blake*. At a meeting of the trustees, it was resolved, that upon condition, that Dr. *Bucknall* should pay 748*l.* as the arrear, after some allowances claimed by him, they would accept a surrender, and grant him and his son a new lease for 70 years, at the rent of 151*l.* *per annum*, with the usual and common covenants. According to that resolution, a lease was granted, dated the 24th of *June*, 1760, to *Samuel Bucknall*; the son of Dr. *Bucknall*; which lease was executed by seven only of the trustees.

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*William Bucknall* died in 1762. In 1765, the trustees ordered, that *Samuel Bucknall*, the tenant, should be allowed 4s. in the pound out of the rent, for land-tax. He died in 1770. In 1798, the trustees discovered, *that the land-tax was at the rate of 1s. in the pound only, and refused to allow more; and that rate was accepted by the defendants. The information farther stated, that in 1760, the premises were worth to be let at a net rent of 40*l.* *per annum;* that under leases were made at considerable rents and fines; and the sum of 900*l.* is now paid by the under lessees to the defendants *Joseph Griffith* and *John Morgan Rice;* who claim to be entitled to the premises, demised to *Samuel Bucknall* in 1760: the former in right of his late wife *Elizabeth*, one of the sisters of *Samuel Bucknall;* the latter as grandson of *Morgan Rice*, who married *Mary*, the other sister.

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The information, under these circumstances, charged that the lease of 1760, was obtained by fraud, imposition, and misrepresentation, and ought to be set aside, without prejudice to any under leases, made *bona fide;* and prayed that relief, and an account accordingly.

The answers denied fraud; and insisted upon the great improvements, made, in confidence of the lease, by *William* and *Samuel Bucknall*, and those claiming under them, and the benefit that must accrue to the charity at the expiration of the lease.

Sir *Samuel Romilly*, and Mr. *Spranger*, for the relators.

This information presents to the notice of the Court a subject of great importance; the careless manner, using the mildest terms, in which trustees administer property, held in trust for charity. This charity has two objects: the one, poor captives under *Turkish* pirates: the other, the poor relations of the founder. *Trustees for a charity, cannot grant a lease for 70 years, except for the pur-

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The Attorney-General v. Griffith.

pose of building. It cannot be represented, that circumstances may not exist, under which the trustees might properly grant such a lease. A case might occur, in which the property could not be made beneficial without building, and the trustees might have no fund. But this case admits no such consideration. This is a mere farm lease. Nothing is to be done by this lessee beyond his obligations under the usual covenants. The trustees of this charity are restrained, not only by the general law, but also by the express constitution of this trust, from demising for a longer period than 21 years, or three lives. With reference to the power of trustees for charity in general cases, in *The Attorney-General* v. *Green*,(a) the demise was in consideration of expenditure upon buildings: but the term was of such duration as could not be proper. The subsequent case, *The Attorney-General* v. *Owen*,(b) was upon a demise of a very different nature, for 99 years, being a mere farm lease. Your Lordship's opinion was clear, that such a lease could not be sustained; expressing surprise, that no instance was produced, in which such a lease was declared a breach of trust. Upon this information it is not contended, that the Court can without any witnesses before it, say that it was a fraud: but it was a gross breach of trust, and is therefore to be set aside, and an account to be directed of what has been received in respect of fines from the under lessees, and for the real value of the estate from the time of actual possession. This Court cannot permit a lease of a charity estate, such as no man dealing for himself, would grant. A strong fact, considering the terms of this lease, is, that a century before *the premises were let for 70 years, at a rent of 130*l.* the tenant to lay out 500*l.* and releasing his right in the premises. * 571

(a) Ante, vol. 6. p. 452.

(b) Ante, vol. 10. p. 555.

Mr. *Hart* and Mr. *Newbolt*, for the trustees.

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One of the trustees joins in this information; and, if they all appeared as relators, that would not be an objection; upon the authority of the *Attorney-General* v. *Talbot*,(*a*) an information by trustees of a charity, for the purpose of setting aside a lease, granted by them, among other grounds, upon inadequacy of the rent reserved. Your Lordship, then Attorney-General, admitting, there was no fraud, contended, that the rent being inadequate, the lease ought to be set aside; and that no objection could be made, that the trustees were coming to set aside their own deliberate act upon the principle, that the Court is the paramount trustee of a charity. The information was dismissed: the Lord Chancellor not denying that principle; but considering the rent reserved as fair and reasonable.

(*a*) In Chancery before Lord *Loughborough*.

This lease cannot be permitted to stand upon two grounds: 1st. As being inconsisent with the rule of letting, prescribed by the founder of the charity: 2dly. Upon the general principle that, where trustees are not restrained by any special rule prescribed, their discretion is exercised improperly by granting a lease, inconsistent with the fair and beneficial administration of the estate in future times: and in that point of view the two cases, decided by your Lordship, have a close application. But this lease may also be impeached upon the ground of fraud and imposition upon the trustee; which from these circumstances may be inferred: the great diminution of the rent, from 250*l.* to 170*l.* *and even that rent permitted to accumulate to an arrear of above 800*l.* The lease has no recital, stating the ground for reducing the rent from time to time; and appears to have been prepared with the object of shutting out the increased value of the estate. There is no imputation of collusion by the trustees: yet it must be acknowledged, that their mode of relieving the tenant from too burthensome a lease, by extending the term from 21 years to 70 years with a reduction of 50*l.* in the rent, is extraordinary, with reference to their duty.

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Mr. *Richards*, Mr. *Hollist*, and Mr. *Johnson*, for the defendants.

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These defendants, who were not parties to the transaction, have been living upon this leasehold estate, considering it their own, under a title, created in 1760; and treating it as such in their family transactions. There is no evidence of fraud; and it is not to be presumed. The trustees, anxious to secure the arrear, with that view offered to extend the term. There is no evidence, that the rent was not proper at the time. The presumption is, that the trustees acted discreetly in fixing the rent, and extending the term; as without giving those terms, they could not have secured that considerable arrear. Fraud by the lessee cannot be inferred, nor gross negligence in the trustees, from the event, that by the circumstances of the times the rent of those estates, in the neighbourhood of *London*, is become inadequate. The complaint is made by the trustees, who have led on the parties to lay out money in improvements. How does it appear, that in 1760 this bargain was not fair, and the reduction of the rent, under circumstances at that time, reasonable? If fraud cannot *be shewn, the question is merely, whether in the given case a lease for 70 years is too long, under the circumstances; taking into consideration the expenditure of the lessee in building and improvement. The proposition, merely upon the duration of the lease, is too large. The nature of the subject must be attended to. The event of speculation in building is not certain, like a husbandry lease. There are several instances in the neighbourhood of *London* of the failure of such speculations; and, though in this instance it has succeeded, the Court cannot upon that ground say this lease was injudicious. * 573

*The Attorney-General* v. *Green*,(a) and *The Attorney-General* v. *Owen*,(b) are very different cases: the former a lease for 999 years, in effect an alienation: the latter a husbandry lease for 99 years, no expenditure secured:

(a) *Ante*, vol. 6 p 452
(b) *Ante*, vol. 10. p. 555.

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no evidence that the trustees pursued any of the courses taken in this instance, to ascertain that the transaction should be a fair execution of the trust: nothing secured for the benefit of the charity: whereas at the expiration of this term the charity will have the estate greatly improved in value. It is of no importance to the charity, whether the expenditure upon the estate is by the original lessees, or by sub-lessees; the effect to those, who are entitled to the estate, being the same.

Sir *Samuel Romilly*, in reply.

It is unnecessary to put this case upon fraud; as a breach of trust will be a sufficient ground for the relief, and it is unsafe at the distance of half a century, the parties to the
* 574 transaction being dead, to go upon *an inference of fraud; which is not established by evidence. If this was originally a breach of trust, the lessee must have been aware of it; and therefore cannot claim under it. The principle established by the case of *The Attorney-General* v. *Owen*(a) is very sound and important, and ought always to be kept in view upon these cases; that a long lease of a charity estate is *primâ facie* a breach of trust; and the proof of the circumstances, that make it a provident administration, is thrown upon those, who take such a lease. Is it possible to support such a lease as this of 1760: the consideration moving from the trustees, giving up 49*l.* a year in the rent, then received; and adding to the term a period, not less than 60 years? The charity evidently was sacrificed to the interest of the lessee. It is extremely doubtful, upon the true construction of the power, whether the trustees could have granted leases for three lives, taking very young lives; whether the risk, that this property might be held a great length of time at too low a rent, should have been incurred. The direction is not positive, to grant, but, that the leases shall not exceed three lives or 21 years. The relators do not desire to disturb the under lessees. The defendants cannot complain of the acquiescence.

(a) *Ante*, vol. 10, p. 555.

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The Lord CHANCELLOR.

This is an information by the Attorney-General at the relation of several persons, interested in the due execution of a trust for charitable purposes; and the prayer of the information aims at this relief; that, without disturbing various under-leases of the charity estate, the lease of 1760 may be so dealt with, as to secure to the charity those advantages, which have been derived to the lessees: the information proceeding *upon this as its principle, that the lease was not made in a due execution of the trust, calculated for the protection of charitable interests; and that all the undue advantages made by means of that lease, are to be considered as in fact an alienation to the prejudice of the charity, capable therefore of being reached by the equity of this Court for the purpose of being rendered advantageous for the benefit of the charity. * 575

I do not advert to the two cases that have been cited, farther than to say, I had always understood it to be a perfectly well recognised and settled principle, that trustees, whether for infants or for charities, (I say nothing of trustees for others, as it is not necessary upon this occasion,) together with those to whom they give derivative interests, and who are also trustees of those interests, derived to them through a breach of trust by the former trustees, act under an obligation to use reasonable providence in the execution of the trust; and the proposition, that in general, it is reasonable providence to make a lease at a rent not increasing in 70 years an interest, the value of which is not very far short of the value of the inheritance, and no other consideration than a rent admitted to be adequate at the commencement, is of such a nature, as at least, not to exclude the power of the Court to call upon those who are concerned, to shew that this *prima facie* most improvident lease is reasonable; and I repeat, that the duty of explanation lies upon them.

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Then see how this case stands. The author of this charity was the testator, *Henry Smith*, in the middle of the century before the last. The deed poll directs expressly, that his trustees are to lease the premises without any fines for the most approved rent that can be *got, in terms either empowering, or as it has been put at the bar, restraining them from granting leases for more than 21 years, or three lives; it makes no difference, whether empowering or restraining: but expressly requiring leases for 21 years, or three lives; and expressly forbidding fines; and requiring the most improved rent that can be got. Take it either way. If there is no express power of leasing, the power of leasing falls under the general restraints, imposed by the general principles of the Court. If there is an express power, it is enough to say, this lease was not made according to the powers, as you can possibly understand them. This is not a lease for 21 years; nor is it a lease for three lives: and, without considering to what extent the power could be made use of, my opinion, without any doubt, is, that where there is a power to grant leases for 21 years, or three lives, under an express restriction of fines, and requiring the most improved rent, such a lease as this, for a rent of 150*l.* a year, cannot stand in equity.

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The extension of the power to granting leases for lives, must be considered as to be used for the benefit of the charity estate, so far as they can extend it, having regard to the obligation, that there was to be no fine, and the most improved rent was to be taken; as to that having regard to the probable length and nature of the interest they were to grant. But, take this to be a power under a settlement to a tenant for life; if, instead of a lease for 21 years, or three lives, a lease for 70 years is taken, there is no principle for reforming that at a subsequent period, at the distance perhaps of half a century, in the middle of the term, by making it a lease for three lives, to be determinable upon any life then to be named, offering to the lessor three lives

in the *middle of the term. It is all conjecture. The lives might be gone long before, and the Court can never act with safety in executing such a proposal.

The first lease to *Blake* was certainly contrary to the powers, but very different from the present lease. But as long ago as the year 1764, the premises were demised for 70 years, at the annual rent of 130*l.* and not only at that rent, but one consideration moving the lessors was the actual expenditure laid out at the time; and at this distance it would be great injustice not to consider that money actually laid out as the consideration, standing among the recitals of the consideration; and it must be remembered, that at least the interest of the 500*l.* was paid during the whole term; and at the end of it the capital. But also the lessee released, as part of the consideration, a valuable interest he had in the premises; with a covenant to pay all taxes to the country or the poor, and to exonerate the lessors from every species of expense upon them, as lessors, or upon the premises which they had, as lessors, to demise. This lease has been suffered to remain: and the Court cannot close its eyes against what is obvious; that the value of property from time to time increases. The premises were to be taken, therefore reference to something more at the end of the term than at the beginning. Also it is not immaterial, that the premises are in these three parishes, so near *London*, as *Kensington*, *Chelsea*, and *St. Margaret's*, *Westminster*.

The circumstances as to *Calloway* are, that in 1735, a revaluation took place, upon a motion among them that it was too highly valued; and a reduction of the rent took place in 1740. *Calloway* entered; but no *lease was granted. His rent was suffered to get into arrear: and in 1749 the trustees agree to let to him and *William Bucknall*. But a lease was in 1750 made to *Bucknall* alone, for 21 years, at the rent of 170*l.* *per annum*, for the first ten years, and 200*l.* *per annum* during the remainder of the *578

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term. It is very material to look at that lease for many purposes of this cause. It contains very large covenants to repair all the buildings, at the time upon the premises; and to keep them in repair, and not only that, but looking prospectively, as was natural, to an increase of buildings, to keep in repair all buildings, afterwards to be erected; and the obligation was at the end of 21 years, to redeliver the premises with the buildings then or afterwards to be put upon the premises, in a complete state of repair. He had disputed with the trustees about the bargain; representing the disadvantages, and the imposition of *Calloway*, and the result is, that upon his own valuation this was a bargain he was content to take in 1755. Afterwards he pays no rent. He was not called upon. The trustees do not enter; but an arrear is permitted, annually increasing; and though the lease was made to him, when *Calloway* was in vast arrear, and it was their duty not to permit a large arrear, it was permitted to go on, until this tenant, under such obligations, represents to the trustees that the arrear was above 820*l*. Then the trustees of the charity, really, almost without attention to the duration of the term, though such a lease, even for 21 years, I might almost say, could not be permitted, think proper to make a lease, taking as the consideration, a surrender of the residue of the term of 21 years, the value being that it was a surrender of a bad bargain upon the tenant's part; the tenant therefore giving nothing, and stating, that in consideration of that surrender, and on the payment of the arrear, they let at 151*l*. *per annum*, the *then supposed value;
* 579
to remain without increase, without the aid of one beneficial covenant for expenditure, for no less than a term of 70 years.

Can it be endured in a Court of Equity, that the representation of the tenant, as a hard bargain to him, and the payment of the arrear are to be considered as a fine; unless they had recorded to demonstration, that it was the only mode, by which that arrear could be recovered; meeting

fairly the principle, calling upon them to shew that the estate was duly dealt with for the whole term of 70 years, where there is no increase of rent, no previous expenditure, no covenant for improvement. Every view that I can take of the circumstances, proves that due attention was not given to the interests of those, whose interests the trustees were bound to protect; and whose interests, to a certain degree, those who take from such trustees, are bound not utterly to destroy. Therefore relief must be given against this lease upon some terms.

We must feel, though judicially I cannot give way to that, the situation of persons whose hopes are disappointed by succeeding to property, valuable in interest, where the consciences of those individuals are not affected, and their attention is seldom called to the consequences. On the one hand, care must be taken not to press too hard upon persons, whose enjoyment has been permitted by the negligence of trustees, and the absenence of persons having beneficial interests, yet on the other, not by falling short of the just degree of retribution, to encourage litigation, and to put those who are interested in the administration of these public institutions, under difficulties. To go back to the great extent that is prayed by this information, is too much; *and I cannot do it consistently; as of some of the persons claiming under *Rice*, there is no representative before the Court. It is not consistent to carry back the account against *Griffith*, where I cannot against *Rice*. But it is impossible to refuse the relief of all the benefits made by these individuals, at least from the time of filing the information; or rather, if that appears, from the time of demand made, before the information was filed. * 580

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Lease under a power, by a person having only a particular estate, if not conformable to the power is not good at law; but where the persons granting the lease have at law the inheritance, with directions only how they are to execute leases, the legal estate passes.

I think this lease would have been good at law. A lease made under a power by a person having only a particular estate, if not conformable to the power, is not good; but where the persons granting the lease, have at law the inheritance, with directions only how they are to execute leases, the legal estate will pass from them.

It is absolutely necessary, that it should be perfectly understood, that charity estates all over the kingdom are dealt with in a manner most grossly improvident; amounting to the most direct breach of trust: and it would be highly dangerous to say, trustees and lessees of charity estates, may engage in transactions that are gross breaches of trust; and when the estate has been used in a manner contrary to the intention of the founder, for a great length of time, when 50 years may have run out, this Court is to modify, qualify, and by correction and emendation set that right at last, which ought to have been right at first. That would be a most dangerous mode of dealing out of the doctrine of this Court.

You do not seek to disturb the under lessees; which is an answer to all that has been said about improvements;
581 *save the expenditure by the lessees themselves, against which must be set the enjoyment they have had. The best mode would be, in order not to disturb the under leases, not to deprive the charity of the benefit of them, that such estate and interest as the persons representing the lessees of 1760 have, should by assignment be vested in the trustees, and that all the instruments should be delivered up.

Mr. *Richards* applied, that this should be without costs, as in *The Attorney-General* v. *Owen*, (a) observing, that these parties were much more innocent. To that the Lord CHANCELLOR at length assented, but with great reluctance; desiring it to be understood, that it was upon the ground that this information was filed before the deci-

(a) Ante, vol. 10. p. 555.

sion of the two late cases, and that he should not be prevailed on to refuse costs hereafter in any case upon an information filed since those cases.'

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## JACKMAN *against* MITCHELL.

May 5, 6.

## MITCHELL *against* JACKMAN.

Bond to secure to one creditor the deficiency of a composition, not communicated to the other creditors, decreed to be delivered up with costs, though to *particeps criminis* in these cases, proceeding upon public policy, the relief being given on account, not of the individual, but of the public.

THE first of these causes was instituted upon a bill, representing, that in *June*, 1785, *Isaac Jackman*, of *Dublin*, the plaintiff's father, proposed to his creditors a deed of composition. The defendant, claiming a debt of 4,043*l.* 3*s.* refused to come in, unless the plaintiff, *Isaac Jackman*, the younger, would give him a bond for securing the debt and interest, beyond the composition, and, that for the purpose of inducing the defendant, who was the largest creditor, to execute the deed, and thereby to get the other creditors to follow his example, to extricate his father from his difficulties, the plaintiff was prevailed upon to execute such bond, and in consideration of that bond the defendant executed the deed, in consequence of which some of the other creditors also executed it.

The bill stated, that the bond given by the plaintiff to the defendant, was dated the 3d of *June*, 1785, in the penalty of 8,086*l.* 6*s.* defeasible on payment by the plaintiff to the defendant of 4,043*l.* 3*s.* on the 3d *June*, 1786, and a memorandum of defeasance of equal date was indorsed, signed by the defendant and plaintiff, reciting the debt, &c. that the plaintiff had applied to the defendant not to take any steps for the recovery of his debt from the plaintiff's father, but to come in and accept such composition as the other creditors might agree to take, or as the estate might produce under any commission of bankrupt, or otherwise; and in consideration thereof had executed the said bond.

* 582

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which it was thereby declared, should stand as a security to the defendant for payment of any deficiency of his said debt, with interest; but in case the plaintiff's father, after obtaining such release from his creditors, or his certificate under any commission of bankrupt, and on or before the 3d day of *June*, 1786, should duly execute to the defendant a security for the deficiency of his said debt and interest, that then, and in either of the said cases, the said bond was to be delivered up and cancelled. The deed of composition having been executed by the defendant and some other creditors, was never acted upon.

* 583 *The bill, charging, that no consideration was received by the plaintiff for this bond, that other creditors, naming one, were thus induced to come in, that the fact was never communicated to them, and that the defendant from consciousness that he could not recover upon the bond, had never attempted to enforce it, prayed, that the bond, as having been obtained for such fraudulent purpose, be delivered up and cancelled.

The case represented by the cross bill, against both the *Jackmans*, was, that *Jackman*, the elder, having given his bond to *Mitchell* to secure a debt of 4,000*l.* *Jackman*, the younger, in *Jan.*, 1785, proposed a composition, to which *Mitchell* refused to accede. *Jackman*, the younger, then proposed, that *Mitchell* should deliver up *Jackman* the elder's bond and grant him a letter of license for one year, and execute to *Jackman*, the younger, and *William Balmer*, a power of attorney to enable them to recover or compound such debt, and to recover such composition or dividend as should be paid in respect of *Mitchell's* debt, in case *Jackman*, the elder, should compound with his creditors, or become a bankrupt, and in consideration thereof *Jackman*, the younger, proposed to become bound to *Mitchell*, not only to covenant for the composition, or dividend, he might receive from the estate of his father, but to pay

*Mitchell*, the residue of such debt, and, in order to induce him to agree to such proposal, assured him the estate of *Jackman*, the elder, should be divided within a year. *Mitchell* agreeing to that proposal, the account was settled, and the bond given by *Jackman*, the son; and in consideration of such bond *Mitchell* executed the letter of license and power of attorney: and delivered up the bond of *Jackman*, the elder; and *Mitchell* stated, that he never executed any deed of composition, though he had by mistake, from the length of *time, by his answer stated the instrument to be a deed of composition. * 584

This bill, charging that the plaintiff was induced by the representations of *Jackman*, the younger, to give up the bond of his father, who was then in good circumstances, prayed an account of what was due upon the bond of the elder *Jackman*, and an inquiry what loss had been sustained by the plaintiff's having delivered up that bond, to be answered by *Jackman*, the younger, or that he may be decreed to deliver up that security.

*Bulmer*, being examined by the plaintiff, *Jackman*, spoke generally of some instrument, deed, or power of attorney, to enable *Jackman*, the younger, and the deponent to act for the creditors of *Jackman*, the elder, in the event of a composition or a commission of bankruptcy: such power, &c. to be limited to 12 months; representing, that *Mitchell* refused to execute such instrument or power of attorney, unless *Jackman*, the younger, would give his bond for the residue of the debt to *Mitchell*, to which *Jackman* at length agreed; in consideration whereof *Mitchell* executed the aforesaid instrument or power of attorney, enabling the deponent and *Jackman*, the younger, or one of them, to act for the creditors, and take such sums in lieu of their respective debts, as might be produced by means of either a deed of composition, or under a commission of bankruptcy; should either the one or the other take place within 12 months; and that none of the other creditors

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had any knowledge of Mitchell's motive for signing, and some of them (naming one) signed in consequence of his signing."

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*Mr. *Richards* and Mr. *Hall*, for the plaintiff, *Jackman*, insisted, that the bond given by him, was void, as against the policy of the law; a fraud upon all the creditors of *Jackman*, the elder; an attempt by one creditor to get a preference; holding out at the same time, that they were all participating in equal proportions; which cannot stand, according to *Cockshott* v. *Bennett*,(a) *Cecil* v. *Plaistow*,(b) and many other cases.

(a) 2 Term Rep 763
(b) Anstr 202 Jackson v Lomas, 4 Term Rep 166 Lastabrook v Scot, ante, vol 3.

Sir *Samuel Romilly*, and Mr. *Bell*, for the defendant, *Mitchell*.

The only question is as to the jurisdiction. If an instrument is void upon the face of it, this Court will not assume jurisdiction upon a bill to have that instrument delivered up; as, the fact being established, it is void equally at law, as in equity. The defendant cannot possibly recover upon this bond; and cannot therefore want the assistance of a Court of Equity. In *Ryan* v. *M'Math*,(c) Lord *Thurlow* held, that, where it is perfectly clear, that a promissory note is void, this Court will not entertain a bill to have it delivered up and cancelled. That decision was disapproved at the time; the instrument appearing to be void, not upon the face of it, but from collateral circumstances. But there is no instance of a decree for delivering up a bond, appearing upon the face of it to be void. This transaction, though certainly not to be supported, appears very different, according to the cross bill, from the representation by the original bill. At least *Mitchell* ought to be placed in the same situation, by having the bond of *Jackman*, the elder, restored to him.

(c) 3 Bro C C 15

*Mr. *Richards*, in reply.

There are many instances, in which this Court acts, though the party, against whom it acts, cannot succeed at law; as upon a marriage brocage bond relief is given here; though the defect appears upon the instrument; so upon annuity deeds.(a) But here no preference, concealed from the other creditors, appears upon this bond. It must therefore be pleaded.

(a) *Bromley* v *Holland*, *ante*, vol 5 p 610 vol 7 p 3 *Underhill* v *Horwood*, *ante*, vol 10 p 209

The Lord CHANCELLOR.

Bond to one creditor, to secure the deficiency of a composition, not communicated to the others, now held bad at law, as well as in equity, though formerly otherwise

The date of this bond, in 1785, is material. It is admitted at the bar, that if this bond was given to secure to one creditor the deficiency of a composition, and was given without communication of that fact to the other creditors, it is bad in equity, and certainly it is now well understood, that it is bad at law also. But I remember, when such a bond was not considered bad at law by any person attending this Hall. It must however now be taken to be bad at law, declarations of Courts of Law upon the point having been very uniform of late. But it is also well settled, that the jurisdiction of Courts of Equity is not gone by the resolution of Courts of Law to adopt the principle of equity.

Such a bond, with the privity or consent of the other creditors may be good

As to the question of jurisdiction, it is not necessary now to say any thing upon that, this case not calling for my opinion upon that point. It is not true, that every instrument, creating an obligation to pay the deficiency of composition, though by the debtor himself, is bad. I remember the case of a person, named *Hebblethwaite*, who had made a composition with his *creditors and secured the deficiency to one creditor by a bond, yet that was held good in the Court by Lord *Thurlow*, as it was part *587

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of the transaction, that that dealing should not be kept secret, but should be communicated to the other creditors; and, as they did not object, Lord *Thurlow* held it good. It is not made out, that the ground of the distinction, taken by Sir *Samuel Romilly*, exists here; for his bond, notwithstanding the indorsement, might be good; and it is bad, only as it is proved *aliunde*, that it was intended to be kept secret; and there is no doubt of that upon the letter. The decree in the first cause must therefore be, without doubt, that this bond shall be delivered up.

It is contended for *Mitchell*, that this distinction must be made in his favour, that he has been by the act of the plaintiff, *Jackman*, placed in circumstances that make it unfit to give him this equitable relief, unless he is replaced in the situation in which he stood before this vitious transaction took place, that *Jackman*, the younger, is bound in conscience to replace the bond of *Jackman*, the elder, which was given up by *Mitchell*, in his hands, before any relief can be given against the other bond. The circumstances attending that bond from *Jackman*, the elder, to *Mitchell*, are very suspicious, and the proof fails in fixing *Jackman*, the younger, with the duty of restoring that bond.

The decree in the first cause must therefore be, that this bond shall be delivered up to be cancelled. The other bill must be dismissed, and the decree must be made with costs in both causes, though *Jackman* was a party, as in these cases, which proceed upon grounds of public policy, the relief is given on account, not of the individual, but of the public.

1807.
May 8.

## *SPELDT *against* LECHMERE.

Transfer of a share in a ship to another part owner, void by not procuring indorsement upon the certificate within the time prescribed by the registry acts after the arrival of the ship.

THIS bill was filed by the assignees under a commission of bankruptcy, claiming an account in right of the bankrupt, as part owner of a ship with the defendant. The defence was a sale by the bankrupt, previous to his failure, of his share in the ship to the defendant. The ship at the time of that transaction was at sea; and the directions of the acts of Parliament(*a*) were not complied with upon the arrival of the ship.

(*a*) Statutes 26 *Geo* III. c 60 Stat 34 *Geo*. III. c. 68.

Sir *Samuel Romilly*, for the plaintiffs, relied upon the express and positive terms of the acts of Parliament.

Mr. *Hart*, Mr. *Thomson*, and Mr. *Treslove*, for the defendants.

The question is, whether these acts apply to such a case, a sale by one partner to another. The act directing(*b*) that the name of the purchaser shall be inserted in the new bill of sale, cannot contemplate a case where the name stands upon the old bill of sale. There is no change of persons, but a mere transfer of interest. If, however, these acts apply to the ship, the distinction between the assignment of a share of a ship, and of the profits, was acknowledged in *Mestaer* v. *Gillespie*.(*c*) In such a case a Court of Equity will not give any assistance against a *bona fide* purchaser.

(*b*) Stat 34 *Geo* III. c. 68 s. 15.

(*c*) *Ante*, vol. 11. p. 621.

*The Lord CHANCELLOR. * 589

Transfer of a ship, void to all intents and purposes, if the registry acts are not complied with, and no relief in equity, as upon a defective conveyance. As to the case of fraud, *Quere*

This bill is filed by persons, who are in law and equity part owners of this ship. It is now settled, that if the

1807. Speldt v. Lechmere.

bill of sale is not according to the terms prescribed by the act, or if the indorsement upon the certificate was not made out within the time prescribed, after the arrival of the ship, the transaction is void at law, and void to all intents and purposes; and independent of the case of fraud, which was not determined in *Mestaer* v. *Gillespie*, you cannot come to this Court, as in the case of a defective conveyance: but the construction of these acts of Parliament, as upon the annuity act,(a) is, that if the transfer is not in the mode prescribed by the act, the whole is void; and the property remains where it was. The consequence, as fraud is not imputed in this case, is, that the property is in the assignees of the bankrupt, who are part owners with the other person, and therefore have a clear right to an account. The policy of the act is evident, and the means by which this policy is enforced; one of which, that whenever a transfer takes place, whether to a part owner or not, it shall be made in form prescribed; as to which the act is positive. As to the earnings of the ship, this is not like the case of *Mestaer* v. *Gillespie*, upon the benefit of a certain charter-party; but if the defendants are to take the earnings of this ship, and not the ship itself, they would be separated for ever.

(a) Stat. 17 Geo. III c.26.

The decree was made according to the prayer of the bill.



* 590

## ANONYMOUS.

*May* 11.

Lunacy is no defence against a commission of bankruptcy, as it would not be against an action.

Commissioners of bankruptcy ought not to decline to act, and have a petition presented, merely to get the opinion of the Lord Chancellor.

MR. *WINGFIELD* mentioned a petition in bankruptcy, presented in consequence of a doubt of the commissioners, how they ought to proceed, the bankrupt having be-

1807.

Anonymous.

come a lunatic; observing, that he was not yet provided with an affidavit in support of the petition.

The Lord CHANCELLOR said, this practice of commissioners declining to act, and having a petition presented, merely to get the opinion of the Lord Chancellor, is not to be encouraged. His Lordship however added, that he could not make any order upon such a petition: a commission of lunacy, will not protect the lunatic against an action; and a commission of bankruptcy is a species of action, against which the lunacy cannot be a defence.



## RAPHAEL *against* BOEHM.

*May* 14.

* 591

Executor charged with compound interest, at 5 *per cent* under a direction for half yearly rents, as not having attempted to execute a trust to accumulate, though no loss happened, and a due execution of the trust could not have produced so much. Allowed subsequent costs of proceedings, consequential upon those, of which the costs were allowed him by the original decree: not as to the inquiries and accounts, relating to the breach of trust, nor charged with those costs, arising principally from a necessary investigation as to the rule by which they ought to be charged.

THIS cause(a) coming on for further directions, and upon a petition, the only question was as to the subsequent costs.

*The Lord CHANCELLOR.

I think the opinion I formerly expressed upon this case is right; and I feel great satisfaction in finding that Lord *Erskine* did not upon the rehearing differ from that opinion. The ground upon which my judgment rests, is, that this will imposed upon the executor the duty of accumulating the property. That observation applies universally through

(a) See the Reports *ante*, 407 vol 11 p 9?

1807. Raphael v. Boehm.

this will. That duty being imposed upon the executor, he must execute the will according to its exigencies. I was informed, and truly informed, that if the executor had laid out the money from time to time, as it was received, in the 3 *per cents.* the legatees would not have received more than he was willing to pay. But that, according to my opinion, made no difference. Though the property was in this instance safe, the Court must go upon a general rule, applicable to all cases. It would be too dangerous to hold that executors shall be excused not doing what they undertake to do, and the legatees are to incur the hazard of the insolvency of the executors, when the question is agitated as to their conduct between them and the *cestuis que trust.*

It was also truly stated, that it was impossible to make interest in the way in which interest was charged upon this defendant; and speaking of interest, properly so called, as distinguished from profit of another description, that was alluded to by Sir *Samuel Romilly*, it certainly is so. But I was struck with this; that though the Court ought not, and for the sake of those for whom executors act, to hold too rigid a rule upon executors, where a fair, anxious, and diligent endeavour to do their duty appears; if executors never do any act which by the will they are required to do; never inquire whether there are competent
* 592 sums to be laid *out; never lay out competent sums, if there are any, they cannot complain if upon general principles they are charged with the most rigid rule; for there is no other rule; and the impossibility of applying any other rule arises, not from the inclination of the Court, but from the nature of the acts of the party; imposing upon the Court the duty of taking some broad line. Therefore my opinion was, that in the instance of an express trust to accumulate, the Court was required to see that the *cestuis que trust* were placed as near as possible in the situation, in which they would have been if the trust had been executed The principles upon which the Court went, was

that this was not a due execution of the trust by the defendant. Subsequent costs are reserved by the decree, as to those parts of the proceedings which merely follow up the accounts directed by the former decree. The circumstance, that costs are given as to such parts of the decree, requires me also to give costs as to those parts; but as to so much of the decree as requires the master to state at what times the several sums came to the hands of the defendant, and directs him to compute interest, to make half yearly rents, and the order of the Court to make good the effect of the inquiries to the legatees, it is impossible to give the defendant his costs. Upon the whole, considering that the Court was called upon to consider what rule was to be applied, and that a great proportion of the costs was occasioned by the necessary investigation of that subject, it would be too hard to give the costs against the defendant. He shall have his costs therefore, except as to those parts which I have noticed; as to which I give no costs. Those parts as to which he is to have costs, are all consequential upon those upon which he had costs by the former decree.

1807. Raphael v Boehm.

## *FRENCH *against* ROE.

* 593

May 2.

It is not necessary that the affidavit for an order that service of the subpœna upon an injunction bill, on the attorney at law shall be good service; should state a previous application to the attorney, and refusal to accept service.

AN action having been brought by the defendants, *Roe* and Company, against the plaintiffs, *French* and Company, an arbitration took place, under which the award directed payment by instalments, to be secured by process under the action. All the instalments having been paid except the last, to the amount of 26,000*l.* the bill prayed an injunction; and cross motions were made, by

1807.

French v. Roe.

the defendants, to discharge an order, that service upon their attorney at law should be good service; as being irregular; and by the plaintiffs for an injunction upon that order.

Mr. *Richards*, and Mr. *Cooke*, in support of the motion by the defendants, insisted upon the practice of the Court of Exchequer, as stated by *Fowler*;(a) observed, that in *Burke* v. *Vickars*,(b) an application to the attorney to accept service was made and refused.

(a) Fowl Ex. Pr 225

(b) 3 Bro C. C. 24. The authority of that case upon the point decided, has been since denied. See *Stephen* v *Cox*, *ante*, vol 4 p 559. *Fullarton* v *Lady Wallace*, *ante*. 360. n

Sir *Samuel Romilly*, and Mr. *Trower*, for the plaintiffs, contended against the practice, as unreasonable.

The Lord CHANCELLOR.

The question upon this practice is, whether the affidavit, upon which the order, that service upon the attorney in the action shall be good service, is obtained, ought for that purpose to state a previous application to the attorney to accept a subpœna, and refusal by *him. No instance has been produced: and if the practice is now to be settled, I cannot conceive that the Court ought to lay down that the affidavit must state such application and refusal. Put the case of a plaintiff abroad, having got the power of relieving himself by execution; is it likely that he should have intimated to his attorney to accept the service; and, if he accepted it without authority, he would be guilty of a breach of duty to his client, and we cannot establish a rule of practice upon that supposition. Therefore, as the allegation that the defendant's solicitor was asked to accept service of the subpœna, has never been considered a necessary part of the affidavit, for this purpose I have no inclination to lay that down.

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The consequence, is, that upon the plaintiffs' motion the injunction must stand until answer.

1807.
*May* 21, 30.

## HUSSEY *against* CHRISTIE.

Lien of the master of a ship by bills drawn, and payments made, for necessary repairs abroad, in the prosecution of the voyage, though no instrument of hypothecation.

A MOTION was made for an injunction against the defendants, assignees under a commission of bankruptcy, against the owners of the ship *Britannia*, and against purchasers of the ship and cargo from them; and for a receiver; the plaintiff being entitled under an engagement entered into with him, as captain of the ship, to one-third of the net proceeds of the cargo, in lieu of wages; and claiming also a lien in respect of bills drawn, and payments made by him as captain, for repairs done to the ship, while abroad at *New South Wales*, in the course of the voyage upon the southern whale fishery. Upon the arrival of the ship, the assignees took possession, and brought her into the *London* docks.

*Sir *Samuel Romilly*, and Mr. *Cullen*, in support of the motion. * 595

For repairs done to a ship in this country, a lien exists as long as the ship continues in the possession of the person who has done the repairs. If the repairs are done in the course of a voyage, those who have done the repairs, or the master making himself liable for them, have a lien. By the law of merchants the master may hypothecate the ship for the repairs: and consequently, as he cannot hypothecate to himself, making himself liable by bills, he may keep possession of the ship. There are many authorities collected by Mr. *Abbott*,(a) as to the general right to hypothecate the ship, and the distinction as to the lien, where the repairs are made in this country, and abroad, is acknowledged by Lord *Hardwicke* in the case of *Buxton* v. *Snee*,(b) and by Sir *Joseph Jekyll*, in *Watkinson* v. *Bernadiston*.(c) Also upon a petition, *Ex parte Shank*,(d) a lien for repairing in a foreign port was admitted.

(a) *Abbott* on *shipping*, 103, &c.
(b) 1 *Ves* 154. *Samsun* v. *Bragington*, 1 *Ves*. 153.
(c) 2 *P. Wms*. 367
(d) 1 *Atk*. 234

1807. Hussey v. Christie.

*Mr. Fonblanque*, and Mr. *Cooke*, for the defendants, assignees under the commission of bankruptcy, against the owners: Mr. *Martin*, and Mr. *Benyon*, for purchasers of shares of the ship: Mr. *Richards*, and Mr. *Roupell*, for purchasers of the cargo.

This claim of lien cannot be admitted. The question is of considerable importance, and in some degree new; as it is an attempt to make this Court the *forum* for a new question, which is properly the subject of jurisdiction in the Admiralty Court. It is settled, that where mate-
* 596 rials *are found, or repairs done, whether in this country or abroad, the owners are personally liable. In the former instance there can be no doubt: it is a mere personal credit to the employer; in the latter, the master has authority to bind the owners personally; he has the power of hypothecation, but nothing more; and he must shew that he has done so, for the purpose of charging the ship in any way, with the exception of the lien, which the person who has done the repairs has; who has been in the case of *Rich* v. *Coe*,(a) determined to have a threefold security: the person of the master, the specific ship, and the personal security of the owners, whether they know of the supply or not. Lord *Kenyon's* opinion however, was,(b) that with regard to the lien, Lord *Mansfield* laid down the doctrine too generally. The master however, who makes this application, has no lien. If he has properly taken up goods on account of the ship, or procured necessary repairs to be done, those persons who furnished the goods, or executed the repairs, have a personal demand against the owners; the subject of an action. The proper mode therefore, under the circumstances of this case, would be to prove as a debt under the commission, the amount of the goods or repairs. Having taken no security, they must rest upon the mere personal security. If they mean to have a security upon the ship, they must take an assignment from the master; the mere fact that they furnished

(a) Cowp. 636.

(b) 7 Term Rep 306. Westerdell v. Dale.

the goods, or executed the repairs, not creating a lien. *Evans* v. *Williams*.(c) This subject must have been in the view of the Court of King's Bench in *Wilkins* v. *Carmichael*,(d) which was much *considered; and it was held, that a lien could not arise by paying the person who had done the repairs; and beyond that, the mere contingent liability of this plaintiff, upon the bills drawn by him, cannot give them a lien. There is but one line for the master to pursue; that is, to exert his power of hypothecation.

(c) 7 *Term Rep* 481 n. *Abb* 97 n

(d) *Doug* 97 *Ed* 2 101

* 597

Mr. *Abbott*(a) states correctly the rule of the civil law; that the persons furnishing the materials, or executing the repairs, have a lien without hypothecation; but also states the maritime law of this country to be perfectly different; and that some instrument must be executed by the master: what that instrument is to be, and in what form, is not precisely ascertained.(b) Various forms are used: sometimes a bottomry bond; sometimes an absolute security upon the ship, not depending upon her safe arrival: sometimes a bond by the master himself.

(a) *Abbott on Shipping*, 119

(b) *Ibid* 103, 104.

Another consideration is, whether the plaintiff, having paid some of the persons who are entitled, is to stand in their place. The effect would be very inconvenient. Suppose the bills drawn by the master upon the owners, had some time to run after the arrival of the ship, could the master, merely as he might eventually be responsible upon the bills, restrain the owners, being then solvent, from getting possession of the ship, and using her as they think proper.

Next, the proper jurisdiction upon this subject is the Court of Admiralty; not this Court. A prohibition would have been refused, and a consultation awarded, the Courts of Law and equity not assuming jurisdiction upon subjects of maritime jurisdiction: *Menetone* *v. *Gibbons*.(a)

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(a) 3 *Term Rep* 267.

1807. Hussey v. Christie.

At least this Court will decide, as the Admiralty Court would, that without hypothecation there can be no lien; and, supposing a lien, the plaintiff, not having himself a right against the ship, has not a right to stand in the place of those whom he has paid. These repairs, though executed abroad, were done at a place where the law of this country prevails. As to the application for a receiver, the contract is, that the captain shall be entitled to one third of the net proceeds, deducting the charges, commission, &c. The owners therefore have the right of disposition; and the bankruptcy makes no difference, the right of the bankrupt vesting in the assignees. The appointment of a receiver between tenants in common would be too strong a measure. The Court will only require security. But the plaintiff's right is only to an account; not to any specific part of the cargo.

Sir *Samuel Romilly*, in reply to the observation, that these repairs were executed, where the law of this country prevails, said, *Ireland* had been held for this purpose to be a foreign country.

The Lord CHANCELLOR.

I am not at all affected by the proposition that I should refer this plaintiff to the Court of Admiralty for a decision upon this question of lien. It is not only not necessary that he should resort to that Court; but, as this is a pure, legal question, it may be just as well tried in a case

* 599 directed to a Court of Law, as if the course had been an action of trover. With respect to the points that have been made, it is perfectly well settled, *that according to the maritime law of this country for repairs done here, the owners are personally liable, and the ship cannot be pledged without a special contract.

For repairs of a ship in this country the owners are personally liable, and the ship cannot be pledged without a special contract.

without a special contract. By the civil law, as is observed in Mr. *Abbott's* excellent work, there is not only that personal contract, but there is a lien upon the ship itself for the repairs, which lien follows the ship into the hands of the purchasers, in different countries for different periods. A great question has been made in the Court of Admiralty, as I collect from *Robinson's Reports*,(a) whether the master, who can hypothecate the ship in a foreign country, can also hypothecate the cargo. The principle upon which he can hypothecate the ship is, that the necessity of acting by an agent justifies the captain, acting as an agent. But the necessity that creates the power to hypothecate, limits that power. The master must do it for a reasonable purpose; only for the benefit of the ship and cargo.

1802.
Hussey
v.
Christie.

By the civil law there is also a lien upon the ship, following her into the hands of purchasers, in different countries, for different periods

Power of the master to hypothecate the cargo as well as the ship, for a reasonable purpose, only for the benefit of the ship and cargo.

* *

The only question then is, whether an instrument must be in a particular form. The right arising out of the right to pledge, it is not necessary, even by the law of *England*, that the distinction with reference to repairs done in *England*, should take place where the repairs are done out of *England*, and it has been determined by the cases alluded to by Sir *Samuel Romilly*, that *Ireland*, *Jersey*, and *Guernsey*, are for this purpose foreign countries. The doctrine laid down, is, that the master has a right to pledge, and may hypothecate. According to the case of *Watkinson* v. *Bernadiston*(b) the *debt was actually considered due to the master by the lien; though there was no instrument of hypothecation. The master may have a lien without any instrument of hypothecation; though the money may be the property of a third person; and it may be very beneficial to the owners, that the master should be able to contract by his own act for a lien upon the ship. In many foreign parts he may be able by his own means to do the repairs: but he may be without the means of

Distinction of the law of *England* requiring an express hypothecation for repairs of a ship in *England*, does not take place as to repairs abroad; and *Ireland*, *Jersey* and *Guernsey* are foreign countries for this purpose.

(b) 2 *P. Wms.* 367.

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The master may have a lien (for repairs &c. abroad) without an instrument of hypothecation against a third person.

(a) Case of the *Gratitudine*, 3 *Rob.* 240 The judgment of Sir *William Scott* is in favour of the power to hypothecate the cargo for the repairs of the ship; in order to effect the prosecution of the voyage.

1807. Mussey v. Christie.

finding any one in another country, who will take the credit of the ship or the owners. It would be directly against the authority of the case in *Peere Williams* to hold, that the captain under these circumstances can have no lien.

This case therefore may be well disposed of by refusing the injunction; security being given to the captain to answer any lien, or demand upon the ship in nature of a lien, that he may establish; and to direct a case for the opinion of the Court of King's Bench; stating all the facts and circumstances. As to the cargo, the plaintiff has, though not a direct interest in the cargo itself, a material interest in the due disposition of it, that the full value may be made of it. The proper course therefore as to that is to refuse the motion for a receiver: security being given for due management in the sale of the cargo, and for one-third of the net proceeds.



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## *SANDERSON *against* WALKER

## CAMPBELL *against* WALKER.

*June 5. 7*

Trustees for sale purchased through a trustee, at an under value, though without fraud, and by auction, and the *cestuis que trust* being infants incapable of discharging the trustees. The purchase set aside with costs.

THESE causes, the circumstances of which have been stated in the former report of *Campbell* v. *Walker*,(a) came on upon the Master's report; stating the value of the estates: the premises called the *Link Farm*, producing upon a resale near double the sum given by the trustees.

The Lord CHANCELLOR.

In this case of *Campbell* v. *Walker*, I understand that Lord *Alvanley* expressed a strong opinion upon the ques-

(a) *Ante*, vol 6 p 678

1807. Sanderson v. Walker.

tion of costs; though he did not decide it; and the decree reserving the costs generally, is perfectly correct. Where infants are concerned, I must hold that as to so much of the suit as has brought back the estate, and produced a resale, for their benefit, they must obtain that relief with costs. By this will very particular directions are given as to the manner in which the sale is to take place, and the division of the lots. These persons were therefore constituted trustees for sale for the benefit of these infants. The principle has often been laid down, that a trustee for sale may be a purchaser in this sense; that he may contract with his *cestui que trust*, that with reference to the contract of purchase they shall no longer stand in the relative situation of trustee and *cestui que trust*; and the trustee having, through the medium of that sort of bargain, evidently, distinctly, and honestly proved, that he had removed himself from the character of trustee, his purchase may be sustained. But *in this case the trustee could not enter into such a contract; as the *cestuis que trust* were infants; and it would be most dangerous to hold, that a trustee to sell for the benefit of infants, bound to exert all his skill, and apply all his knowledge, with strict integrity for their benefit, may exert that skill, and use that knowledge for his own advantage; and the principle, that the trustee shall not buy the trust property without the consent of the *cestui que trust* is properly applied, when the very purchase made by the trustee is evidence that he means to deal for his own advantage.

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This lot was put up to sale by auction. My opinion, formed upon great consideration, is, that the circumstance that the sale is by auction, makes no solid difference. The auctioneer is nothing more than an agent for the vendor. It is impossible to sift the propriety and justice of the transaction by an investigation of all the circumstances of conduct by the person employing the auctioneer, when those circumstances can be known only to himself; and if this species of sale by auction is to destroy the principle, what

1807.

Sanderson v. Walker.

happened in the case of General *Harris*(a) proves distinctly, that there is no medium of sale that may be made a wider inlet to fraud than sales by auction.

These trustees did not go to the auction, avowing, that they went there with the purpose to bid, and thereby giving distinct evidence to all persons attending for the same purpose, that the trustees, who ought to know the value, and must be supposed not to have brought the estate to sale before they had obtained that information, were at least so far convinced of the value as to be induced to bid.

* 603 Instead of that, they *employed a person named *Clarke*, who did not then declare for whom he bid; but afterwards declared himself a purchaser for another person, who declared himself a purchaser for one of the trustees.

The other estate consisted of leasehold premises, upon which a certain number of years was to run; and the actual rent was 700*l.* *per annum*, the infants to take the capital at the expiration of 21 years. The sum of 6,040*l.* was bid for that lot. It was put up to sale again, and the same person, *Clarke*, was the ostensible purchaser at the price of 6,310*l.* That is pretty decisive evidence of the consequences: upon the latter sale the trustees giving evidence upon their own part, that they had not at the former sale bid enough, therefore bidding more at the subsequent sale. After the second sale, the fact, that the trustees were the purchasers, was disclosed. Then the bill in the first of these causes was filed: the trustees by their answer stating merely, that some of the estates were sold, but not disclosing that they were the purchasers. The will was not proved in that cause. In the interim, the bill was filed in the cause of *Campbell* v. *Walker*, on behalf of the persons entitled to the residue, to have the sales undone; and praying that the estates might be resold. Lord *Alvanley*'s opinion was, that the Court acting for the benefit of the infants, should direct an inquiry, whether a resale would be for their benefit.

(a) See *Ex parte Bennett*, *ante*, vol 10 p. 381.

That direction, is in one sense, a confirmation of the principle, laid down by me, most frequently in bankruptcy; that if it is for the benefit of the infants, that the purchase should not be disturbed, the Court will not disturb it, and will disturb it, if that will be for their benefit. That principle, open to considerable objection, must be admitted, if a better principle cannot be found. The objection is that *a great temptation to purchase is afforded to trustees; the question, whether the resale would be advantageous to the *cestui que trust*, being of necessity determined at the hazard of a wrong determination. * 604

The Master's report stated the value of one of these estates to be near double the price given by the trustee; and upon the resale it actually produced double; the value therefore not resting on a mere speculative opinion, but established by that fact. The other estate did not produce much more or less than the former sale; but that estate actually producing a rent of 700*l. per annum*, the profit by the resale must be considered with reference to the intermediate income between the sales, and the value of so much of the term as had run out; and then the benefit to the infants is nearly in the same proportion under the second sale.

Upon the question of costs, I cannot lay down, that infants are to seek such relief against their trustees at the hazard of the expense attending it. With regard to so much of the suit therefore, as relates to calling upon the trustees to submit to a resale, and the consequential directions, the relief must be given with costs. As to the other parts of the case, there is no ground for charging them with costs, with regard to these accounts, that must have been taken if the sale had been conducted upon other principles. They must therefore have these costs, to which they would in the ordinary case have been entitled.

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7 *Ante*, 407. vol. 11. p. 92.

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